IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1977

No. 77-1781

RABCO METAL PRODUCTS, INC.,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

EDDY S FELDMAN

Suite 600
The Broadway Plaza
700 South Flower Street
Los Angeles, CA 90017
Telephone: (213) 624-3339

Attorney for Petitioner
Rabco Metal Products, Inc.

TOPICAL INDEX

TOPICAL INDEX (Cont.)

—oOo—

APPENDIX, Exhibits H—O

—oOo—

TABLE OF AUTHORITIES

Cases

TABLE OF AUTHORITIES (Continued)

TABLE OF AUTHORITIES (Continued)

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1977

No._____

RABCO METAL PRODUCTS, INC.,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

—oOo—

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

—oOo—

TO THE HONORABLE, THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The petitioner, Rabco Metal Products, Inc., respectfully prays that a writ of certiorari issue to review the judgment and opinions of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on February 17, 1978.

Opinion Below

The Opinions of the Court of Appeals, not yet reported, appear in the Appendix hereto. The decision and order of the National Labor Relations Board are reported at 221 NLRB No. 208. They are included in the Appendix also.

Jurisdiction

The judgment of the Court of Appeals for the Ninth Circuit was filed on February 17, 1978, a timely petition for rehearing en banc having been denied February 8, 1978.

QUESTIONS PRESENTED

1. Was there a hearing consistent with the requirements of due process of law where the administrative law judge holding the hearing is an employee of the very agency, the National Labor Relations Board, which administers the statute under the proceedings are brought?

2. What is the quantum of anti-union animus necessary to overcome the defense of economic justification in §8(a)(3) discrimination cases?

Statutory Provisions Involved

Constitution, Article V:

> "No person. . . shall be deprived of life, liberty or property without due process of law. . . ."

United States Code, Title 5:

§556(b)

> ". . . the functions of presiding employees and of employees participating in decisions in accordance with §557 of this title shall be conducted in an impartial manner . . . ."

National Labor Relations Act, 8(a):

> "It shall be an unfair labor practice for an employer —
>
> (1) to interfere with, restrain, or coerce employees in the exercise of rights guaranteed in §7; . . .
>
> (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization; . . .
>
> (5) to refuse to bargain collectively with the representatives of his employees. . . ."

STATEMENT OF THE CASE

Rabco Metal Products, Inc., is a very small manufacturer of restaurant and kitchen equipment in the City of Los Angeles. (In the election held at the plant on April 25, 1975, a total of just 22 ballots was cast.)

Rabco's business is divided between "custom" and "production" work of kitchen and restaurant equipment. Custom work refers to one-of-a-kind fabrication wherein items designed and maufactured to the customer's order in Rabco's shop and later are installed at the customer's premises. Production work refers to a number of items which are manufactured in the shop for inventory and which are sold from a catalog. Rabco's employees include welders, machine operators, polishers, sheet metal installation mechanics, drivers, and helpers.

Bernard Raab (herein Mr. Raab) is the owner and operator of the business. His son, Mel Raab, is vice president of the corporation and assists in all departments of the business.

The sales volume of Rabco is also quite small, and at the times in question was declining sharply and dangerously. Monthly sales were as follows:

July 1974	$161,649.51
August 1974	133,051.92
September 1974	130,505.74
October 1974	122,960.42
November 1974	117,897.96
December 1974	119,186.52
January 1975	92,978.78
February 1975	102,305.64
March 1975	88,591.11
April 1975	80,834.50
May 1975	93,484.50
June 1975	72,783.80

Mr. Raab explained that when January and February 1975 orders came in very poorly, his projections were not promising. He noted that "all construction did die down. All I got was promises that the job will break tomorrow, the job will break tomorrow, and then nothing was loose. . .the projection was very bad, as my record shows. It was mainly--the projection was based on the custom work. The custom work was very bad. We were living off inventory. We were living off inventory. We were making stock we were selling and making and production work." The custom work which meant the most in volume suffered the most. As a result, Mr. Raab consulted with his supervision: "I had to make a decision to let some of the guys go and cut down on my payroll and expenses."

In spite of this pessimistic projection and in spite of a drop in shipments of 43 percent in six months (by January, 1975), and of more than 50 percent at the time of the hearing, the Board (and the ALJ) found that:

> "Respondent's evidence in this regard [valid economic reasons for layoff] inconclusive in view of the undisputed testimony that in the past when work was slow, Respondent concentrated on producing stock equipment for inventory and the absence of anything in the record to indicate whether this decline in sales was different from previous years."

In all the years that Mr. Raab had been in business for himself there had apparently been on organizing activity, and the employees had never been represented by a bargaining agent. No violations of the Act

have ever been brought against the company before the present proceedings. Nor is there any history of any anti-union bias or activity on the part of the company to be found in the record in these proceedings.

The narration which follows is derived from the transcript of the hearing before the Honorable Earldean V.S. Robbins, Administrative Law Judge, on July 1 and 2, 1975, in Los Angeles.

On October 19, 1974, Anthony Vince, a sheet metal mechanic and member of the Union (Sheet Metal Workers' Food Service Equipment Division, International Association, Local No. 75 Sheet Metal Workers' International Association, AFL-CIO), at the urging of the Union, sought employment at Rabco for the purpose of getting a union in the shop. He was employed as a kitchen installer.

In the employment interview, Mr. Raab, being told by Mr. Vince that he was from Chicago ("a real union city"), asked, according to Mr. Vince, "You are from Chicago and you don't belong to a Union?"

Mr. Vince testified:

"I said, 'I got expelled from a union in Chicago, that's why I wanted to work for you.'"

This, it turned out, was a lie. On cross-examination Mr. Vince revealed that he had been a union member for 12 years and that he had never been expelled from a union. Mr. Vince also told the employees at Rabco that he had been expelled from the union in Chicago.

On cross-examination he admitted that he had purposely lied to Mr. Raab and to

the other employees, because he felt that if he told the truth he would not get the job.

Mr. Vince talked up the Union in the shop, and he solicited membership in Local 75, but he did not think that anyone in management was aware of his true union status and function.

"Q. To your knowledge no one in management knew you were involved with the union until the day you were fired; is that correct?

"A. Yes, sir.

"Q. So you never were around Berney [Raab] when you were talking up the union?

"A. No, sir, I was not.

"Q. You have no knowledge he could have found out about it?

"A. There were a lot of people in there. I talked to so many people.

"Q. Do you have any direct knowledge?

"A. Anything tangible?

"Q. Yes.

"A. No."

Mr. Vince testified that Mr. Raab later told him that "he [Mr. Raab] ain't going to have anybody talk about a union in here, and that's why I am fired." On cross-examination, he responded candidly:

"Q. There are no witnesses anywhere when you say Berney talked to you about the union; is that correct?

"A. His word against mine."

Mr. Raab's version of Mr. Vince's departure is different:

"Q. Why did you [Raab] let him go?

"A. Because he just didn't want to do any work. He was just not doing the work.

"Q. Be a little more specific.

"A. I was watching him in the morning when we were loading the trucks. He was standing watching the other guys doing the work. I evaluate the man after that many years experience, I can evaluate the man and see whether he is a mechanic, whether he knows what he is doing or whether he is just trying to get by. . . . I told him that he is not what he represented himself and that his work -- that he cannot continue letting the other guys work and not doing the work and he doesn't -- he said he can weld; he doesn't weld. He said he can install by himself, which he did not."

To the question as to whether there was any mention of the union at the time of Mr. Vince's leaving, he responded, "None whatsoever at all."

In any event, neither Mr. Vince nor the Union filed any charges at this time

(November, 1974) against the Company.

In her opinion the Administrative Law Judge addressed herself to the credibility of the witness, Mr. Vince:

> "I credit Vince whom I find to be an honest forthright witness. Contrary to Respondent's contention, I find that his lying regarding his Union affiliation during his employment interview does not detract from his credibility. It is a well known fact of industrial life that otherwise honest employees frequently lie to their employers and prospective employers regarding their union sympathies and activities."

Two or three months later, in January, 1975, organizing for the Union resumed as employees Fernando Munoz and Mario Delgado talked about the advantages of the Union and passed out union cards. Rafael Esquivel, George Garcia and Arturo Flores were among the employees to sign cards.

Mr. Munoz, who is a sheet metal mechanic, testified that about the middle of February Mr. Raab talked to him at his work bench, no one else was present, saying to him only, "I understand you are circulating a petition."

According to Mr. Munoz, Mr. Raab told him to come to Mr. Raab's office at 4 P.M. He did so. Only he and Mr. Raab were present. Mr. Munoz testified that Mr. Raab said the Union had called him and said that Mr. Munoz had been the first one to sign the petition. He said that Mr. Raab said he did not need a union, and that if the employees wanted one "to move on." Mr. Raab denied that he ever had any conversations with Mr. Munoz about the Union, and when asked about the

latter's statement to the contrary, declared "that is a pure fabricated lie."

David Oldfield, Dennis Chatman's helper in the power brake machine, testified that Mr. Raab asked him, in Dennis Chatman's presence if either of them had signed a union card. Mr. Oldfield said they both said no.

On the next day (February 14), Mr. Oldfield testified, Mr. Raab approached the two men again and asked whether each man had signed a card. Mr. Oldfield said no. Mr. Oldfield said that Mr. Raab said, "I understand most of the guys have been signing union cards in the shop and I am going to let some guys go."

But Mr. Chatman did not testify as to the February 13th conversation, at all. As to February 14, he testified that Mr. Raab did ask Mr. Oldfield whether he had signed a union card. He said that Mr. Raab said that work was slow and that, if necessary he would close the plant for a couple of weeks and take a vacation. Mr. Chatman was not terminated by Rabco.

Mr. Oldfield, on the other hand, was separated from Rabco. He was hired in 1972 as a helper to Mr. Chatman on the power brake machine. (This machine forms sheet metal by the strokes of a power ram.) But he made no progress as Mr. Raab anticipated he would and should have:

> ". . . when you put a man at the helper, at the power brake [machine], after a certain amount of time, you expect this man to take over the break and the man that is at the break, you elevate him to a higher position. I could not do

this, because David Oldfield just wasn't learning and he got to a point where he was too expensive for a helper and I could not do anything with him anywhere else. That was my consideration."

Mr. Oldfield asserted that Mr. Raab had spoken to him four or five times about his union activities. He said that Mr. Raab stated, "The guys tried to get the union in the shop; I'm going to close down for two months, and that's all he said."

Mr. Raab recalled talking with Mr. Chatman and Mr. Oldfield on February 14. Mr. Chatman, according to Mr. Raab, asked him whether he would close the shop if there is a strike. Mr. Raab responded, "If we close the shop, we will go on vacation. We can use a vacation the way business is, I don't mind." Mr. Raab considered this a joke since Mr. Chatman had "jokingly" called him over and was chuckling and laughing.

The ALJ found Mr. Oldfield's testimony incredible in some respects. At the same time she said that "Raab was less than truthful in his statements, as indicated by his assertions to other employees described below."

The ALJ found that Mr. Raab's contention that Mr. Oldfield was too expensive for a helper "is unconvincing."

Rafael Flores Esquivel, a polisher, testified that Mr. Raab took him to his office and using his secretary as an interpreter asked what he wanted with the union card he signed.

However, the secretary Lulu Connors, denied interpreting for Mr. Raab during any conversation between Messrs. Esquivel and Raab. And Mr. Raab also denied having any conversation with Mr. Esquivel.

Mr. Raab testified that Mr. Esquivel was laid off in February, 1975, when the work was slow. Herman Tepos, the head polisher, testified that Mr. Esquivel made lots of mistakes and he did not take care of them. For this reason he asked Mr. Raab to let him go.

Arthur Flores who was a driver for the company testified that he had two conversations with Mr. Raab regarding union activities. Mr. Raab denied having any conversation with Mr. Flores about the Union although he did say he was present at a conversation in his office when a supervisor asked Mr. Flores if he had signed a union card. Mr. Raab told the supervisor he did not authorize such inquiries: "I practically threw him out of my office."

Mr. Raab testified in part that Mr. Flores was discharged because of the insurance problem. The ALJ stated that this was not a sufficient reason for discharging him.

Ms. Rochelle Nagel, an employee of Arnold Herbert Insurance Agency which wrote automobile insurance coverage for Rabco, testified the insurance carrier did not wish to continue coverage on Arturo Flores, a driver-helper, because of his young age (18 or 19) and his rather poor driving record: between February and October, 1974, two moving violations and involvement in at least one accident.

The carrier threatened to cancel coverage if the company did not sign an exclusion by February 28, 1975. Mr. Raab signed the exclusion and tried to find a replacement for Mr. Flores, which he did. The replacement was also a young man, but he was an auto mechanic as well as a truck driver: "It was exactly what I was hoping for and looking for. . . ."

George Olguin Garcia had worked for Rabco for over three years prior to the middle of February 1975. He was a utility man in the shop. He speaks some English, he testified at most of the hearing through a Spanish interpreter. However, he testified in English that Mr. Raab asked him whether he had signed a union card. He said that Mr. Raab said to him that if he did not like the job he could take his tools and go away.

Mr. Raab did not recall any conversation with Garcia at any time regarding the union. Mr. Raab testified that he selected Mr. Garcia for layoff because of his flucuating attendance record, his inability to communicate instructions to Mr. Garcia, and Mr. Garcia's numerous, constant and costly mistakes.

On February 14, 1975, Mr. Raab received a letter from the Union stating it had signed a majority of the men in the shop. He read the letter, but he did not want to believe it.

> "So I thought about it and I figured out since the Union has a right to take a vote, we are in a free country, I have a right to take a vote of my own to find out whether they are right or they are wrong. I wanted to prove it to myself whether it is just a

> hoax. . . . I instructed my secretary to compose a letter and distribute it among the employees and make sure that it specifically stressed that it is a voluntary letter and it is a vote whether the boys want the union or not and nobody is under no obligation to sign this letter. If they don't want it, there will be no reprisals or anything. I specifically gave those instructions to my secretary. I left the office, I had another appointment somewhere with a customer. . . . The following week, Monday, my secretary the bookkeeper, she came over and told me she has all the letters, this statement, and everyone of them has signed and it seems that nobody wants to join the Union. I was very happy about it and it proved that I was right and as far as I was concerned, that was it, the case was closed."

The letter referred to by Mr. Raab which was circulated by Ms. Connors, Mr. Raab's secretary, among the men in the shop was on the Company's letterhead:

> "I, _____ do not wish to join Sheet Metal Workers Union, Local #75 or any other organized labor movement and am fully satisfied with the conditions and benefits given by RABCO METAL PRODUCTS, INC. This is my voluntary and ultimate decision.
>
> Signed_____Date_____."

Speaking to the men singly or in small groups, she asked them to sign the statement. Ms. Connors conveyed no threats of reprisal from Mr. Raab if the employees did not choose to fill out and sign the form. Most employees signed the form that afternoon and returned it to the office; others signed the form a day or two later. The signers included union organizers Messrs. Munoz and Delgado, as well as Messrs. Esquivel, Oldfield, Garcia and Flores.

REASONS FOR GRANTING THE WRIT

1. The Decision Below Denies the Petitioner of a Hearing Consistent with Due Process of Law.

Petitioner is aware that it is not the practice of this honorable Court to redetermine matters of credibility which have been decided by the administrative agency and reviewing courts.

However, there is an unusual and unsettling set of circumstances in this case. The Memorandum filed by the Court of Appeals on November 30, 1977, at pages 1 and 2, states:

> "The Administrative Law Judge credited the testimony of all but one of Rabco's employees. She did not credit the testimony of Bernard Raab, owner and operator of Rabco. Credibility determinations will not be disturbed unless a clear preponderance of the evidence convinces they are incorrect. NLRB v. International Longshoremen's and Warehousemen's Union, supra, at 483. Raab's categorical denial of all but one of the conversations testified to by his employee is inherently

> suspect. Coupled with other inconsistencies in his testimony, there is sufficient evidence in the record to find the credibility determination correct."

In its Petition for Rehearing or Suggestion of Rehearing En Banc dated December 14, 1977, petitioner objected to the characterization of Mr. Raab's testimony as "inherently suspect." Petitioner observed that:

> "Raab testified under oath. To find him incredible is to lay a foundation for charges of perjury. This has not been suggested anywhere so far in these proceedings.
>
> "No reason is given (nor authority cited) as to why 'categorical denial' of all but one of the conversations is inherently suspect." In any case, Raab did not deny conversations; he denied that he uttered threats of job loss if the company were to be organized."

The Court of Appeal, in its order dated February 8, 1978, then stated:

> "The memorandum heretofore filed is modified by striking the two sentences at page 2, lines 1 through 6, following the citation to Warehousemen's Union, and by substituting the following: 'Raab's categorical denial of all but one of the conversations testified to by his employees, coupled with other inconsistencies in his testimony, supplied sufficient evidence in the record to sustain the Board's credibility determination.'"

The "other inconsistencies" were not spelled out nor indicated in the November 30, 1977 Memorandum, nor in the February 8, 1978 Order.

Petitioner is not aware of any rule of law, or evidence which states that employer's categorical denial of all but one of the conversations testified to by his employees coupled with other inconsistencies - unspecified - supply

> "sufficient evidence in the record to sustain the Board's credibility determination."

How this denial and the accompanying undescribed inconsistencies can provide evidence to sustain the Board's determination is not explained, nor, failing that, is any precedent cited for creating such a standard of review.

It seems that if the employer's denials had been tentative rather than categorical, he might have a chance of being believed. He cannot do anything about the alleged but unspecified inconsistencies.

Now, the Court of Appeals for the Ninth Circuit has created a new measure of credibility determination by its holding in the present case which permits credence to be given by the Board to the testimony of admitted liars, provided they are union-oriented, but to give no credence to an employer's testimony, because in the words of the Court of Appeals Memorandum his testimony is "inherently suspect." Let it be noted that if the employer's testimony is inherently suspect because it denies all but one of the conversations with the employees about the union, then the opinion of the ALJ suffers from the same suspicion in reverse.

Anthony Vince admittedly lied about his union membership. However, the ALJ stated in her opinion:

> "I credit Vince whom I find to be an honest forthright witness. Contrary to Respondent's contention, I find that his lying regarding his Union affiliation during his employment interview does not detract from his credibility. It is a well-known fact of industrial life that otherwise honest employees frequently lie to their employers and prospective employers regarding their union sympathies and activities."

The startling generalization by the ALJ that, in effect, all employees are "good guys," and all employers are not to be believed, that is, are liars, is strange indeed--in this country, anyway. This is the equivalent of saying that all minority people (including women) are inferior and bad people, and that all white people are good and superior people. How would the ALJ have reacted if this charge had been made about her, as a generalization.

The Declaration of Independence and the Constitution assure every person of equality of respect and treatment, but this generalization of the ALJ and Board flies in the face of the words to be found there.

There are no references to authority for any of this raising of lying to the level of a respected art and given sanction to it by a solemn tribunal of the United States. Where is the authority and what is the experiential data to provide a basis of what is almost judicial notice that honest employees frequently lie to their employers?

The result of this attitude of the Board and its functionaries, as evidenced by the Court below, is that once it is proved that the witness is an employer little credence will be given his testimony when it supports the employer's position.

There has not even been an attempt by the Board to justify the holding by the ALJ that Vince was a credible witness, although he admitted that he lied. This is the point: while it is true that if the ALJ gave credit to Mr. Raab and found the Board's witnesses wanting in credibility, The Board might complain of the ALJ's bias, the fact is that the ALJ has made her own initial finding that a key Board witness who has lied is a credible witness. The entire case of the Board is tainted by the acceptance of this witness' testimony, since it is used to brand all of Mr. Raab's testimony as being incredible.

As was said by Judge Hutcheson in 1943, in National Labor Relations Board v. Phelps, 136 F.2d 562, 563-4:

> "The Board does not, indeed, it could not, contest the corrections of the principle respondents invoke, for a fair trial by an unbiased and non partisan trier of the facts is of the essence of the adjudicatory process as well when the judging is done in an administrative proceeding by an administrative functionary as when it is done in a court by a judge. Indeed, if there is any difference, the rigidity of the requirement that the trier be impartial and unconcerned in the result applies more strictly to an administrative

> adjudication where many of the safeguards which have been thrown around court proceedings have, in the interest of expedition and a supposed administrative efficiency been relaxed. Nor will the fact that an examination of the record shows that there was evidence which would support the judgment, at all save a trial from the charge of unfairness for when the fault of bias and prejudice in a judge first rears its ugly head, its effect remains throughout the whole proceeding. Once partially appears, and particularly when, though challenged, it is unrelieved against, it taints and vitiates all of the proceedings, and no judgment based upon them may stand."

Surely, Mr. Raab is entitled to have his testimony believed, when it has not been shown that he has lied - the Court below found no lies by Raab; only inconsistencies.

While it is true that the Administrative Procedure Act, 60 Stat. 244, 5 U.S.C. §1010, grants a large measure of independence, see Ramspeck v. Federal Trial Examiners Conference (1953), 345 U.S. 128, 73 S.Ct. 570, 97 L.Ed. 872, to the ALJ's it appears to this petitioner that decisions like the present one are inevitable. This case demonstrates the built-in bias of the adjudicatory when a hearing officer who is attached to the agency presides in litigation by that agency involving a private party. So long as that ALJ offices in the same building as the agency staff, so long as the seal of the agency adorns the bench on which that judge sits, so long as that judge's assignment to the case is by the very agency whose actions or contentions that judge is being

called on to review - all matters of which this Court may take judicial notice - it is impossible for that judge to be or convey the image of being an impartial fact finder. See Segal, "The Administrative Law Judge - Thirty Years of Progress and the Road Ahead." The American Bar Association Journal, November 1976, p. 1425; Davis, "Judicialization of Administrative Law: The Trial-type Hearing and the Changing Status of the Hearing Officer." 1977, Duke Law Journal 389, 403; Davis, "A New Declaration of Independence for Administrative Law Judges." 17 The Judges' Journal 16 (1978).

It is the petitioner's position in this litigation that it is being deprived of its Fifth Amendment rights of due process when it is not tried in an impartial manner by a trier of the facts and law, and that, at the least, there is a violation of the Administrative Procedure Act which adjures that impartiality.

Petitioner believes that in view of the stupendous number of decisions being made by ALJs, hearing officers, referees and others, that the issue presented here is of sufficient importance to grant the writ.

2. There Is A Conflict in All Decisions of Courts of Appeals on the Quantum of Anti-Union Animus Which Is Required When There Are Economic Reasons For Layoffs.

With reference to Rabco's contention that it had a business reason for the discharge, the Court of Appeals for the Ninth Circuit stated in its Memorandum filed November 30, 1977:

"The Board must show that an employee would not have been discharged but for his union activity in order to establish a violation of Section 8(i)(3). A business reason for a discharge cannot be asserted as a pretext if in fact the discharge was motivated by the employee's union activities. NLRB v. Klaue, 523 F.2d 410, 413 (9th Cir. 1975).

"Rabco contends that the discharges of employee Oldfield, Garcia, Esquivel and Flores on February 19, 1975, were for good cause, i.e., a decline in his business and their unsatisfactory work performance. The reasons given by Raab for not previously discharging these employees are not persuasive. The delay and the ultimate timing of these discharges were at least partially motivated by their union activity, in violation of Section 8(a)(3)...."

On December 7, 1977, the Court of Appeals for the Ninth Circuit filed an opinion in the matter of Western Exterminator Company v. National Labor Relations Board and National Labor Relations Board v. Industrial Carpenters Union, Nos. 76-2293 and 76-2617.

In the course of this opinion it observed that:

"It is a long-standing rule of law within our circuit that where a discharge is motivated by both a legitimate business consideration and protected union activity, '[t]he test is

whether the business reason or the protected union activity is the moving cause behind the discharge.' NLRB v. West Coast Casket Co., 469 F.2d 871, 874 (9th Cir. 1972), quoting NLRB v. Ayer Lar Sanitarium, 436 F.2d 45, 50 (9th Cir. 1970); accord, NLRB v. Miller Redwood Co., 407 F.2d 1366, 1370 (9th Cir. 1969); Signal Oil & Gas Co. v. NLRB, 390 F.2d 338, 341 (9th Cir. 1968); NLRB v. Security Plating Co., 356 F.2d 725, 728 (9th Cir. 1966). See also, Mead v. Retail Clerks Local 839, 523 F.2d 1371 n. 7 (9th Cir. 1975). But see, NLRB v. Central Press, 527 F.2d 1156 (9th Cir. 1975). Stated conversely, 'where a party has two motives, one permissible and the other impermissible, the better rule is ... that the improper motive must be shown to have been the dominant one.' Famet, Inc. v. NLRB, 490 F.2d 293, 296 (9th Cir. 1973), quoting NLRB v. Lowell Sun Pub. Co., 320 F.2d 835, 842 (1st Cir. 1963) (Aldridge, J., concurring).[3] See generally, Comment, Employer Discrimination Under Section 8(a)(3), 5 Tol.L.Rev. 722, 765 (1974)." Page 7, lines 2-22.

In Footnote 3, the Court observed further that:

> "An analysis of the Supreme Court opinions in this area leads us to conclude that our position, that antiunion animus must be the dominant or moving cause, is the better rule. The Court has held that where the

employer's conduct is inherently destructive of section 7 rights, unlawful motivation is presumed to exist. NLRB v. Great Dane Trailers, Inc., 388 U.S. 26, 33 (1967); NLRB v. Brown, 380 U.S. 278, 287 (1965); American Ship Building Co. v. NLRB, 380 U.S. 300, 311 (1965); NLRB v. Erie Resistor Corp., 373 U.S. 221, 228 (1963); Radio Officers' Union v. NLRB, 347 U.S. 17, 45 (1954). Even where illegal animus is presumed to exist, however, the Board need not find a violation of the Act.

> '[S]uch situations [inherently destructive employer control] present a complex of motives and preferring one motive to another is in reality the far more delicate task, reflected in part in the decisions of this Court, of weighing the interests of employees in concerted activity against the interest of the employer in operating his business in a particular manner and of balancing in the light of the Act and its policy the intended consequences upon employee rights against the business ends to be served by the employer's conduct.'

NLRB v. Erie Resistor Corp., supra, 373 U.S. at 228-29, see also, NLRB v. Great Dane Trailers, supra, 388 U.S. at 33-34; American Ship Building Co. v. NLRB, supra, 380 U.S. at 311-12.

"Thus, since in those cases where discriminatory animus is presumed to exist the Board and courts may nevertheless uphold the employer's conduct, we believe that in a case, such as the one before us, where the employer's conduct is not inherently destructive, the Board and courts, a fortiori, are not compelled to find a section 8(a)(3) violation where the antiunion animus is but one of multiple motivating factors."

In applying this preferred rule, the Court denied enforcement to the Board's finding of violations of §8(a)(3) by the employer, because the alleged violations were not supported by substantial evidence.

The opinion in the matter came to the attention of counsel for the petitioner here, in its slip form, and he hastened to bring to the attention of the Court below the fact that the rule set forth in Western Exterminator does not appear to be the same rule as that Court or the Board applied in this case.

And indeed, the Court agreed with petitioner - in its Order of February 8, 1978:

"Respondent has correctly called to our attention disharmony in our opinions concerning the degree to which an employer must be motivated by anti-union animus, in a mixed motive case, before a discharge will be deemed unlawful. Thus in Western Exterminator Company v. NLRB, ____ F.2d ____ (No. 76-2293, Dec. 7, 1977), the court adopted the 'moving cause' or 'dominant motivation' formulation. Similar language is used in such cases as NLRB v. West Coast Casket Co.,

469 F.2d 871 (9th Cir. 1972); NLRB v. Miller Redwood Co., 407 F.2d 1366 (9th Cir. 1969); and NLRB v. Ayer Lar Sanitarium, 436 F.2d 45 (9th Cir. 1970) (also uses 'partially motivate'). On the other hand, such cases as NLRB v. Central Press of California, 527 F.2d 1156 (9th Cir. 1975) state simply that anti-union sentiment must be at least 'partially motivate the discharge.'"

However, it went on to say:

"It is unnecessary for us to decide whether differing formulations represent a substantive conflict, or whether they are simply linguistic differences because in the case before us there was ample justification in the record to sustain the Board's determination that anti-union animus was the moving force for the discharge. No delicate balancing of motivation was required under the facts of this case. We, therefore, leave to another case the question whether intracircuit conflict exists which would justify en banc rehearing."

Petitioner urges that the different formulations do represent a substantive conflict, not only within this Circuit but among the other Circuits, as well; that the Board did not in this case balance the motivations of this employer; that the ALJ and the Board gave no credence to the employer's testimony about its motivations. Petitioner urges that the matter be referred back to the Board for further testimony and a subsequent balancing of motivations consistent with the latest statement of the

rule by the Court of Appeals for the Ninth Circuit.

A. Statutory Language

Section 8(a)(3) of the NLRA provides that it is an unfair labor practice for an employer "by discrimination in regard to hire or tenure of employment. . . to encourage or discourage membership in any labor organization . . ." It is not mere discriminatory conduct which is outlawed by the section, but only that discrimination which is for the purpose of encouraging or discouraging union membership. Therefore, inquiry into the employer's intent or motivation is relevant in §8(a)(3) cases.

B. Defense of Economic Necessity

Sometimes, an employer, as in the present case, will contend that its conduct was not motivated by an illegal object but, rather, by compelling economic necessities. There was initially some confusion as to how this employer defense of economic justification was to be treated, but, the issue was clarified in the Great Dane Trailers case, 388 U.S. 793, 87 S.Ct. 1792, 18 L.Ed.2d 1027 (1967), in which the Supreme Court stated the following general rule:

> "First, if it can reasonably be concluded that the employer's discriminatory conduct was inherently destructive of important employee rights, no proof of an antiunion motivation is needed and the Board can find an unfair labor practice even if the employer introduces evidence that the conduct was motivated by business considerations. Second, if the adverse effect of the discriminatory conduct on employee

> rights is 'comparatively slight' an antiunion motivation must be proved to sustain the charge 'if the employer has come forward with evidence of legitimate and substantial business justifications for the conduct.'" 388 U.S. at 34.

C. Quantum of Antiunion Animus Necessary to Overcome Defense

Cases involving "comparatively slight" harm have caused a split of authority among the Courts of Appeals regarding the quantum of proof necessary to establish unlawful employer motivation. Thus, if the employer appears to have acted out of mixed motives -- i.e., partially out of economic need and partially out of "antiunion animus" -- the First and the Ninth Circuits require that the illegal motive be shown to be "predominant" or "moving." Several circuits, on the other hand, merely require that the illegal motive be a "partial" or "contributing" factor in the employer's conduct.

Two recent, conflicting decisions -- one in the Ninth Western Exterminator Co. v. NLRB, 97 L.R.R.M. 2187 (9th Cir. 1977), denying enforcement in relevant part of 223 NLRB No. 181, 92 L.R.R.M. 1161 (1976), and another in the Tenth, M.S.P. Industries, Inc. v. NLRB, 97 L.R.R.M. 2403 (10th Cir. 1977), enforcing in relevant part 222 NLRB No. 29, 91 L.R.R.M. 1379 (1976) - have again illustrated this split of authority. These decisions reflect the difference among the Circuits which make it opportune for the granting of this petition for a writ.

D. NLRB's Position

The NLRB itself has not adopted a rigid rule on this issue. Ordinarily, the Board

will generally find a violation if it concludes that antiunion animus played a substantial or significant part in motivating the employer's discriminatory acts. In the M.S.P. Industries case, cited above, for example, the test applied was whether the employer's conduct "was motivated solely by reason of economic necessity, or, in whole or material part" by an unlawful purpose."

E. Where It Is Held That Antiunion Animus Must Be the "Predominant" or "Moving" Motivation

(1) Western Exterminator Case

In Western Exterminator Co. v. NLRB, supra, the Ninth Circuit refused to enforce a Board order finding a §8(a)(3) violation. The case involved the discharge of an employee who revealed to fellow union members that the union president was also a supervisor at his employer's operation. The discharge occurred at the time of "an usually severe seasonal decline" in the employer's business. Initially, the employee was told by the employer that the layoff was temporary and would end when business picked up. Subsequently, when the employee protested that employees with less seniority than he were still at work, the employer referred the matter to the supervisor. The supervisor then made clear that he had no intention of recalling the employee, ostensibly because of the employee's poor work and marginal competency.

The Court accepted the Board's finding that the supervisor had played a "significant role" in obtaining the employee's discharge. Further, the Court was willing

to assume, as the Board found, that the discharge was "at least partially motivated" by the employee's union activities in publicizing the supervisor's dual role. However, noting that "[t]his . . . is not the dispositive test," the Court refused to enforce the Board's finding of a §8(a)(3) violation.

The Court of Appeal declared:

> "The central issue is: How significant of a role must the antiunion animus play in the discharge in order to constitute a violation of section 8(a)(3)?
>
> "It is a long-standing rule of law within our circuit that where a discharge is motivated by both a legitimate business consideration and protected union activity, '[t]he test is whether the business reason or the protected union activity is the moving cause behind the discharge.' NLRB v. West Coast Casket Co., 469 F.2d 871, 874 (9th Cir. 1972), quoting NLRB v. Ayer Lar Sanitarium, 436 F.2d 45, 50 (9th Cir. 1970); accord, NLRB v. Miller Redwood Co., 407 F.2d 1366, 1370 (9th Cir. 1969); Signal Oil & Gas Co. v. NLRB, 390 F.2d 338, 341 (9th Cir. 1968); NLRB v. Security Plating Co., 356 F.2d 725, 728 (9th Cir. 1966). See also, Mead v. Retail Clerks Local 839, 523 F.2d 1371, 1377 n. 7 (9th Cir. 1975). But see, NLRB v. Central Press, 527 F.2d 1156 (9th Cir. 1975). Stated conversely, '[w]here a party has two motives, one permissible and the other impermissible,

the better rule is . . . that the improper motive must be shown to have been the dominant one.' Famet, Inc. v. NLRB, 490 F.2d 293, 296 (9th Cir. 1973), quoting NLRB v. Lowell Sun Pub. Co., 320 F.2d 835, 842 (1st Cir. 1963) (Aldridge, J., concurring). See generally, Comment, Employer Discrimination Under Section 8(a)(3), 5 Tol.L.Rev. 722, 765 (1974)."

The Ninth Circuit noted that only in those cases in which the employer's conduct was "inherently destructive" of employee rights, was unlawful motivation presumed to have existed. Even in those cases, however, the Board was not bound to find a violation, but was expected to engage in a weighing process, balancing the interests of the employees engaging in concerted activity against the interest of the employer in running his business in a certain manner. Therefore, the Court stated,

"Since in those cases where discriminatory animus is presumed to exist the Board and courts may nevertheless uphold the employer's conduct, we believe that in a case such as the one before us, where the employer's conduct is not inherently destructive, the Board and courts, a fortiori, are not compelled to find a section 8(a)(3) violation where the antiunion animus is but one of multiple motivating factors."

(2) Application of the Standard

Turning to the record of the case, the Court concluded that there was clear evidence that economic reasons -- the need to

lay off at least one employee because of decreased business, and the fact that the discharged employee was the least competent in the company -- were the dominant and moving cause of the discharge. On the other hand, there was no substantial evidence to support a conclusion that the employee's union activities was the dominant cause. Based on these considerations, the Court refused to enforce the Board's order.

(3) The Ninth Circuit Agrees With the First Circuit

The First Circuit has also adopted a strict formulation of the applicable standard. In the 1976 case of Stone & Webster Engineering Corp. v. NLRB, 537 F.2d 461 (1st Cir. 1978), the Court held that the Board had not sustained its burden of proving an improper motivation for several discharges. The Court explained its position as follows:

"It should be emphasized that we by no means are implying that economic hard times give an employer carte blanche to engage in discrimination, under the guise of generalized reductions in the work force. On the contrary, if a discriminatory motive coexists with a non-discriminatory motive, a discharge would be improper if the discriminatory motive predominates." 537 F.2d 466-67, note 8.

In the earlier case of NLRB v. Fibers Int'l Corp., 439 F.2d 1321 (1st Cir. 1971) the First Circuit was even more emphatic in requiring that the Board make "a clear showing that the employer's dominant motive

was not a proper business one, but union animus." 439 F.2d at 1312. The Court stressed:

> "So that there may be no misunderstanding about what we mean by dominant motive, we state it again. Regardless of the fact that enforcing the penalty may have given the employer satisfaction because of the employee's union activities, the burden is on the Board to establish that the penalty would not have been imposed, or would have been milder, if the employee's union activity, or a union animus, had not existed." 439 F.2d at 1312, fn. 1.

The Board petitioned for a rehearing in the Fibers case, asking that the Court delete the word "dominant" in its statement of the rule, arguing that it would impose an undue burden on the Board and create a conflict with other circuits. The Court refused to delete the word, stating,

> "To dominate means to control. The dominant motive is the controlling or effective motive. We use this particular word because of its insistent quality, to remind the Board that its burden is to find that the improper motive was the one that in fact brought about the result." 439 F.2d at 1315.

Furthermore, the Court concluded that cases cited by the Board were not really in conflict with its statement. Although acknowledging that several cases seemed to use language requiring only a "partial" improper motive, the Court found that, in effect, the standard actually applied was

"not significantly different from ours."

However, whatever the state of the law may have been in 1971 when the Fibers case was decided, it appears clear today, in light of subsequent cases, that a genuine conflict does not exist, since at least one Court has expressly rejected the "predominant" standard, while others have adopted a standard under which an improper motivation "in any part" will support the finding of a violation. See, for example, Oil, Chemical & Atomic Workers v. NLRB, 547 F.2d 575, 590 (1977).

F. Where It Is Held That Antiunion Animus Need Only Be A "Partial" Or "Contributing" Factor

(1) M.S.P. Industries Case

Several circuits have adopted a less stringent standard for the "quantum" of antiunion animus required to be shown to overcome a defense of economic necessity. An example is the Tenth Circuit's recent decision in M.S.P. Industries, Inc. v. NLRB, 97 L.R.R.M. 2403 (10th Cir. 1977), enforcing in relevant part 222 N.L.R.B. No. 29, 91 L.R.R.M. 1379 (1976). In that case, following a union victory in a representation election, the employer abandoned its longstanding practice of avoiding layoffs during slack periods by making work for idle employees in other departments. The Board, adopting the decision of the Administrative Law Judge, found that this change in policy and the subsequent reduction of hours, layoffs, and requirements that employees call in each day to see if work was available, were undertaken, "in whole or material part, in retaliation against its employees for designating the

Union as their bargaining agent." 97 L.R.R.M. at 2407. The employer argued that the Board had applied an improper standard in rejecting its defense of economic necessity. The Tenth Circuit disagreed and enforced the Board's order.

(2) Economic Necessity Is Not Per Se Defense

The Court noted that the employer's position amounted to an assertion that once an economic justification is established, it constitutes a per se defense to any §8(a)(3) discrimination charges. This assertion was rejected: "We feel that proof of a business justification does not have such an immunizing effect. Instead, when the employer has come forward with evidence of a legitimate motive for a dismissal, the effect is then to make it incumbent on the General Counsel to demonstrate explicitly that an improper motive 'contributed to the discharge.'" 97 L.R.R.M. at 2408. Further, the Court stated, "if it is established that an unlawful discrimination against those active in union affairs was a partial motive for a discharge, there is a violation."

Upholding the Board's position in the instant case did not mean, as the employer contended, that "any indication," however slight, of antiunion animus will be sufficient to support a finding of a violation. Here, the Board's standard - "in whole or material part" - was "not unreasonable" and accorded with the Tenth Circuit's own announced standard. 97 L.R.R.M. at 2408. The Court acknowledged that authority existed for another, "even stricter test" - i.e., that the improper motive be shown to "predominate" - but the Court adhered to its own standard.

The Court rejected the argument that three prior Tenth Circuit cases supported the employer's position. In Bill's Coal Co. v. NLRB, 493 F.2d 243 (10th Cir. 1974), the Court rejected the Board's finding of a violation on the grounds that more than a mere surmise or suspicion of improper motive was required. However, in that case the economic necessity was not treated as a per se defense; the evidence was carefully weighed and found insufficient to support the complaint. Similarly, in Cain's Coffee Co. v. NLRB, 404 F.2d 1172 (10th Cir. 1968), the Court did not regard economic justification as conclusive; the case held that the employer's presentation made it necessary for the General Counsel to establish that an "improper motivation contributed" to the employer's conduct. Finally, in NLRB v. Beech Aircraft Corp., 483 F.2d 51 (10th Cir. 1973), the Court rejected a Board finding of a violation where there was economic necessity for a layoff, and the discharge of a particular employee was required by the seniority provision of the contract. Since the employer was bound by the seniority rule, the fact that it may have "welcomed" the opportunity to discharge a troublesome employee did not by itself make the discharge unlawful. However, the Court noted, the instant case was distinguishable, since the employer here did not merely "welcome" an opportunity, but was motivated in whole or material part by an illegal purpose.

(3) Evidence Weighed

The Court then turned to a detailed examination of the evidence relevant to the discharges of individual employees to determine whether the Board's findings were supported by substantial evidence in the record as a whole. As to three employees, the

Court found that "the change in lay-off policy, the timing of the layoffs, the outspoken union support of [the employees], and the coercive statements by [the employer's] management" constituted substantial support for the Board's findings. 97 L. R.R.M. at 2409.

As to two other employees, the Court noted that there appeared to be no evidence that the employer specifically knew of any union activity by these employees. However, although such knowledge is ordinarily required to support a violation, there are circumstances in which such specific knowledge may not be necessary. For example, the Court said, "a power display in the form of a mass layoff, where made for an unlawful purpose to discourage union membership, may establish a violation 'even if some white sheep suffer along with the black.'" 97 L.R.R.M. at 2410. Since the circumstances in the instant case seemed analogous to the example above, and in view of the employer's demonstrated antiunion animus, the Court found that the Board's finding of a violation was substantially supported.

However, the Court rejected the Board's finding that another employee was discriminatorily denied a wage increase. The employee testified that when he was hired, a supervisor told him that he would receive a wage review in two weeks; the supervisor denied this. The ALJ, based on credibility considerations, found that it was not established that the employee had been promised a wage review. The Board disagreed. However, in the absence of any further evidence, the Court found that the Board's conclusion was not supported by substantial evidence.

Other circuits in accord are:

District of Columbia: Allen v. NLRB, 561 F.2d 976 (D.C. Cir. 1977) remanding 224 NLRB 1306, 92 L.R.R.M. 1533 (1976).

Second Circuit: NLRB v. Pembeck Oil Corp., 404 F.2d 105, 109 (2d Cir. 1968), vacated on other grounds, 395 U.S. 828, 89 S.Ct. 425, 23 L.Ed.2d 737 (1969).

Third Circuit: NLRB v. Eagle Material Handling, Inc., 558 F.2d 160 (3d Cir. 1977).

Fourth Circuit: Firestone Tire & Rubber Co. v. NLRB, 539 F.2d 1335, 1337 (4th Cir. 1976); Neptune Water Meter Co. v. NLRB, 551 F.2d 568 (4th Cir. 1977).

Fifth Circuit: NLRB v. Whitfield Pickle Co., 374 F.2d 576 (5th Cir. 1967).

Sixth Circuit: NLRB v. Adam Loos Boiler Works Co., 435 F.2d 707 (6th Cir. 1970).

Seventh Circuit: Catholic Bishop of Chicago v. NLRB, 559 F.2d 1112 (7th Cir. 1977).

Eighth Circuit: Crenio, Div. of G.F. Bus Equipment, Inc. v. NLRB, 529 F.2d 201 (8th Cir. 1976).

G. Antiunion Animus and Rabco (The Petitioner)

The Court of Appeals for the Ninth Circuit in Rabco applied its earlier rule which, as we have seen, is different from that of Western Exterminator. The old rule had it that

> "A business reason for a discharge cannot be asserted as a pretext if in fact the discharge was motivated

by the employee's union activities, NLRB v. Klaue, 523 F.2d 410, 413 (9th Cir. 1975).

"Rabco contends that the discharges of employee Oldfield, Garcia, Esquivel and Flores on February 19, 1975, were for good cause, i.e., a decline in his business and their unsatisfactory work performance. The reasons given by Raab for not previously discharging these employees are not persuasive. The delay and "the ultimate timing of these discharges is critical. The conclusion is inescapable that the discharges were at least partially motivated by their union activity, in violation of Section 8(a)(3)."

Rather, Western Exterminator states the correct rule, where, quoting Famet, the Court said:

"[w]here a party has two motives, one permissible and the other impermissible, the better rule is . . . that the improper motive must be shown to have been the dominant one."

In the opinion of the Board in Rabco, there is no consideration of this test of balancing of motives as set out in Western Exterminator. It is not even mentioned.

Furthermore, there was no finding by the Board that the employer's conduct was "inherently" destructive of §7 rights, so that if it can be said that there was anti-union animus present, it was but one of multiple motivating factors, and the Board was not compelled to find a §8(a)(3) violation.

Interestingly enough, in Rabco the Court of Appeals for the Ninth Circuit cited NLRB v. Klaue, as mentioned above. "Interestingly" because the Court refused to enforce a Board finding of a violation of §8(a)(3) where there were multiple motivating factors:

"Deciding as we do that the evidence does not support the inference that Klaue knew of Rago's union activities, we do not need to examine the validity of the business reasons offered by the employer for the discharge. The burden is on the Board to establish an illegal motive for discharge. Famet, 490 F.2d at 296. It suffices to say, however, that the business slowdown experienced by the store and Rago's repeated clerical errors are not implausible reasons for discharge.

"Since we find the inference that Klaue knew of Rago's role in the union activities is not supported by substantial evidence, we deny enforcement to the order of the Board in so far as it requires the employer to reinstate Rago with back pay and to cease and desist from discharging or discriminating against any employee for union activities." 523 F.2d 410, 414.

(1) What Should the Remedy Be?

There is currently a conflict of authority as to the requisite showing of antiunion animus necessary to overcome a defense of economic necessity in §8(a)(3) discrimination cases. While the majority of the circuits require merely that the illegal motivation be shown to be a

contributing or partial factor, two circuits require that it be proved to be the dominant or moving factor.

This would seem to be an opportune time to resolve the conflict among the circuits. Furthermore, in view of the changing of rules by the Court of Appeals for the Ninth Circuit, it would seem proper remand this matter to the Board for further evidence on the motivations of the employer-petitioner.

CONCLUSION

Petitioner respects, of course, the doctrine which does not permit the addition of new evidence into the proceedings at this stage. Rabco wishes to mention, however, that there have become available only recently statements from interested persons which should have been considered by the ALJ and the Board - and should be now - because they contain evidence which cannot be ignored. They would produce doubts in the decision-makers' minds sufficient to show that the case against petitioner had not been proved. This is a case, indeed, where the Court should not "abdicate all appellate responsibility".

Petitioner believes, then, that the writ should be granted for both of the questions posed in this petition. In the one question it is not just the rights of Rabco which are at stake; it is the fundamental rights of every person in this country to feel secure that the merits of any dispute will be heard and decided on in an impartial and independent manner.

Secondly, there is confusion in the law on the matter of a valid business reason being a defense to an assertion of

discriminatory discharges. Interestingly enough, every circuit has been heard from on the issue.

For these reasons, a writ of certiorari should issue to review the Judgment and Opinions of the Court of Appeals of the Ninth Circuit.

Dated: June 14, 1978

Respectfully submitted,

EDDY S. FELDMAN

Attorney for Petitioner
Rabco Metal Products, Inc.

EXHIBIT "H"

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

NLRB v. Rabco Metal Products, Inc.
[Pages 1-2, 1-30]

221 NLRB No. 208 FJP

D--743
Los Angeles, Calif.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

RABCO METAL PRODUCTS, INC.

and

SHEET METAL WORKERS' FOOD SERVICE EQUIPMENT DIVISION, INTERNATIONAL ASSOCIATION, LOCAL NO. 75, SHEET METAL WORKERS' INTERNATIONAL ASSOCIATION, AFL--CIO

Cases 21--CA--13413--1, 21--CA--13413--2, and 21--RC--14083

DECISION AND ORDER

On September 9, 1975, Administrative Law Judge Earldean V.S. Robbins issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and brief and has decided to affirm the rulings, findings,[1] and conclusions of the Administrative Law

1/ Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an Administrative Law Judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant

Judge and to adopt her recommended Order.

D--743

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the Respondent, Rabco Metal Products, Inc., Los Angeles, California, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order.

Dated, Washington, D.C. Dec. 23, 1975

John H. Fanning, Member

Howard Jenkins, Jr., Member

John A. Penello, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

1/ (Cont.) evidence convinces us that the resolutions are incorrect. Standard Dry Wall Products, Inc., 91 NLRB 544 (1950), enfd. 188 F.2d 362 (C.A. 3, 1951). We have carefully examined the record and find no basis for reversing her findings.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
BRANCH OFFICE
SAN FRANCISCO, CALIFORNIA

RABCO METAL PRODUCTS, INC.

and

SHEET METAL WORKERS' FOOD SERVICE EQUIPMENT DIVISION, INTERNATIONAL ASSOCIATION, LOCAL NO. 75, SHEET METAL WORKERS' INTERNATIONAL ASSOCIATION, AFL-CIO

Case Nos. 21-CA-13413-1
21-CA-13413-2
21-RC-14083

Burton Litvack, Esq., of Los Angeles, Calif., for the General Counsel.
Stuart M. Levine, Esq., of Los Angeles Calif., for the Respondent

DECISION

Statement of the Case

EARLDEAN V.S. ROBBINS, Administrative Law Judge: These consolidated cases were tried beofre me in Los Angeles, California on July 1 and 2, 1975. The charges were filed by Sheet Metal Workers' Food Service Equipment Division, International Association, AFL-CIO, herein called the Union, and served on Respondent on February 24, 1975, and were amended on March 5, 1975 in Case No. 21-CA-13413-1 and on March 6, 1975 in Case No. 21-CA-13413-2. The consolidated complaint issued on April 4, 1975 alleging that Respondent had violated Section 8(a) (1) and (3) of the National Labor Relations Act. The petition in Case No. 21-RC-14083 was filed by

the Union on February 18, 1975. Pursuant to a Decision and Direction of Election issued by the Regional Director of Region 21 on March 27, 1975, an election by secret ballot was conducted on April 25, 1975, which resulted in six ballots for and eight ballots against the Union, with eight challenged ballots. On June 18, 1975 the Regional Director determined that the challenged ballots of two voters should be sustained and that the challenged ballots of Arthur (Arturo) Flores, Rafael Flores Esquivel, Hurshal Holliday, David Oldfield, George Olguin Garcia, and Anthony Vince raised substantial and material issues of fact requiring a hearing and ordered that Case No. 21-RC-14083 be consolidated for purposes of hearing, ruling, and decision by an Administrative Law Judge with Case Nos. 21-CA-13413-1 and 21-CA-13413-2.

The basic issues in both the unfair labor practice cases and the representation case is whether Flores, Esquivel, Oldfield, Garcia and Vince were terminated or "permanently laid off" because of union activities. Also at issue in the unfair labor practice cases is whether Respondent engaged in certain conduct violative of Section 8(a)(1) of the Act.

Upon the entire record, including my observation of the demeanor of the witnesses, and after due consideration of the briefs filed by the General Counsel and the Respondent, I make the following:

Findings of Fact

I. Jurisdiction

Respondent is a California corporation with a place of business in Los Angeles, California, where it is engaged in the manufacture and fabrication of sheet metal products. Respondent in the normal course and conduct of said business

operations annually sells goods valued in excess of $50,000 to customers located within the State of California, each of which customers annually purchases and receives goods valued in excess of $50,000 directly from suppliers located outside the State of California.

The complaint alleges, the parties stipulate, and I find that Respondent is, and at all times material herein has been, an employer engaged in commerce and in operations affecting commerce within the meaning of Section 2(6) and (7) of the Act.

II. Labor Organization

The complaint alleges, the parties stipulate, and I find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

III. The Alleged Unfair Labor Practices and the Representation Proceedings

A. The Discharge of Anthony George Vince

In October 1974, Anthony George Vince sought union acceptance in obtaining employment. A union representative suggested that he apply for employment with Respondent but warned that he was of the opinion that Respondent would refuse to hire anyone from the Union. The union representative further suggested that if Vince obtained employment with Respondent he should try to organize Respondent's employees. Vince agreed to do so but his primary reason for seeking employment with Respondent was that he needed a job. He was never on the Union's payroll.

On October 19, Vince was employed by Respondent as a kitchen installer. During his employment interview, mindful of the union representative's admonition, Vince told Bernard Raab 1/ that he had been expelled from a union in Chicago. Vince admits that this was untrue. 2/ According to him it is well known in the industry that Chicago is a heavily unionized city so he thought that he had to have some reason to support his claim that he was not in the union, a claim he felt he had to make to receive consideration for employment.

Immediately upon commencing employment at Respondent's shop, Vince began discussing with fellow employees the benefits of unionism. On November 13 or 14, 1974, according to Vince, Raab approached him at the timeclock at quitting time and said he had to lay him off. Vince said, "Okay, give me my money, and give me the keys so I can get my tools out of the truck." Vince went to the truck where Raab approached him again. Raab said he was not going to have anyone in the shop talking about union activity. Vince said he did not know what Raab meant. Raab replied that he was not going to have anyone talking about a union in Respondent's shop and that was why Vince was being fired. Raab further said he was not

1/ Respondent's president and general manager.

2/ Raab's account of what was said in this regard is in substantial agreement with that of Vince. However, according to him, Vince volunteered this information whereas, from Vince's account, it is not clear whether or not he volunteered the information. Raab also testified that Vince was employed on a trial basis. I credit Vince's denial that Raab mentioned such to him.

going to have a union in the shop.

Raab's version of this discharge interview is completely different. According to him, he told Vince that he was not the skilled installer that he represented himself to be and made some remark about Vince letting someone else do all the work. Vince allegedly replied, "If you don't like it, make me out my check." Raab denies any mention of the Union.

I credit Vince whom I find to be an honest forthright witness. Contrary to Respondent's contention, I find that his lying regarding his union affiliation during his employment interview does not detract from his credibility. It is a well known fact of industrial life that otherwise honest employees frequently lie to their employers and prospective employers regarding their union sympathies and activities. Furthermore, Raab's subsequent reaction to the union activities of other employees and the statements made to them lend credence to Vince's testimony. Also, Raab first testified that Vince was discharged because "he just didn't want to do any work. He was just not doing the work," yet he never warned Vince about his work. In all of the circumstances, particularly the reason given Vince for his discharge, I find that Vince was discharged in violation of Section 8(a)(1) and (3) of the Act.

B. The Interrogations and Threats

1. Facts

In January 1975, 3/ Fernandez Munoz, a sheet metal mechanic employed by Respondent, began trying to organize Respondent's employees. He distributed union authorization cards 4/ which were signed by a number of employees including discriminatees Rafael Flores Esquivel, 5/ Arturo Flores, 6/ George Olguin Garcia, 7/ and David Oldfield. 8/

Sometime during the early to middle part of February, Raab approached Munoz at his work bench and said, "I understand you are circulating a petition." Munoz replied, "I don't know what you are talking about." Raab said, "I want to see you after work in my office." Later that day Munoz went to Raab's office. Raab said someone had accused Munoz of circulating a petition. Munoz said he did not understand what Raab meant. Raab said, "Somebody accused you." Munoz demanded a confrontation with his accuser. Raab said he could not do that and asked why would anyone accuse Munoz. Munoz said he did not know.

3/ All dates hereinafter will be 1975 unless otherwise indicated.

4/ Mario Delgado also distributed some authorization cards but there is no evidence that Respondent had knowledge of his activity.

5/ His name appears as corrected at the hearing. He signed a union authorization card in January.

6/ Flores signed a union authorization card in January.

7/ Garcia signed a union authorization card in January.

8/ Oldfield signed a union authorization card on February 13.

About a week later, prior to February 14, Raab had another conversation with Munoz in Raab's office. During this conversation Raab told Munoz the Union had just telephoned and said that Munoz was the first one to sign the petition. Munoz asked what he was talking about. Raab replied, "They just called up and said that you were the first one to sign the petition." Raab then said, "I know that you have, that Roberto has, Nicolas [Esparos], Arturo [Flores] and Rafael [Flores Esquivel] all signed." Raab further said he did not need a union and if they wanted one, to move on. He said the petition the employees signed was not valid because some of the Mexican employees were in the country illegally. 9/

On February 13, according to David Oldfield, Raab approached him and employee Dennis Chatman at their work station. Raab asked if either of them had signed union cards. They both replied no. Raab said he understood that some people had been signing union cards. On the following day, Raab approached them again and said he understood that both of them had signed union cards. He then asked Chatman if he had signed a card. Oldfield said no. Raab then said, "I understand most of the guys have been signing union cards in the shop and I am going to let some guys go."

9/ This is from the testimony of Munoz. Raab denies having any conversation with Munoz regarding the Union.

Chatman did not testify as to the February 13 conversation, but testified in partial corroboration of Oldfield's account as to the February 14 conversation. Thus, he testified that Raab inquired if he had signed a union card. When Chatman replied no, Raab then asked Oldfield if he had signed a union card. Oldfield said no. Raab then said he had received a letter from the National Labor Relations Board saying they had enough signatures to hold an election for the Union. Raab further said, "No one seems to have signed a card." I asked the Mexicans if they signed the card and they would say "no savvy." Raab then said that work was slow and if necessary he would close the plant for a couple of weeks and take a vacation.

Raab admits that he had a conversation with Chatman and Oldfield on February 14. His version, however, is somewhat different. On direct examination he testified that as he walked by the power brake machine, Chatman called him over and said at least you are not prejudiced, you gave everyone cards to sign for a vote but the Union did not give me a card to sign. Raab described the conversation as being one in jest. When asked if he recalled making any comment regarding closing the job, Raab testified, "I don't recall the exact conversation, but I know I said, 'well, if we have to, we will close for a while.' and that's it." On cross-examination, Raab testified that Chatman asked him if the shop would be closed if there was a strike, and that he replied, "If we close the shop, we will go on vacation, we can use a vacation. The way business is, I don't mind."

Rafael Flores Esquivel testified that a week to two weeks prior to February 19, Raab asked him what happened to the union paper Fernando Chaparrita gave him. Esquivel said he did not

understand. 10/ Raab then took Esquivel to the office and using his secretary as an interpreter asked what Esquivel wanted with the union card he signed. Esquivel said he did not know anything about it, that he thought Raab would be the person to give the employees papers to sign. Raab said it was best that Esquivel had not signed any of those papers, that he, Esquivel, did not know anything about it. Lulu Connors, Raab's secretary and bookkeeper, denies interpreting for Raab during any conversation in which he interrogated an employee regarding the Union and does not recall interpreting during a conversation between Raab and Esquivel. Raab denies any conversations with employees regarding the Union other than the one with Chatman referred to above.

Arturo Flores testified as to two conversations with Raab regarding union activities. He testified that the first conversation was sometime in January and the second a couple of days later around the beginning of February. However, he places the second conversation as occurring the Tuesday after he signed the February 14 repudiation of the Union described below so it is apparent that the conversations occurred in mid-February. According to him the first conversation occurred in the office. Employee Arthur Schildknecht 11/ was present. Raab said the Union had sent him a list of the persons that had signed for the Union and Flores' name was on it. Raab asked Flores why

---

10/ Esquivel is Spanish speaking but speaks limited English.

11/ Sometimes referred to as "Red."

did he lie, why did he say he did not sign for the Union, that he had proof on his desk. Flores said he did not know what Raab meant and asked to see the proof.

Raab denies having any conversation with Flores, however he testified that he was present when Schildknecht and Flores came into his office. Schildknecht asked Flores if he had signed a union card, at which point, according to Raab, he told Schildknecht, "If you want to do anything like this, just do it on your own but don't get me involved." Schildknecht did not testify.

George Olguin Garcia testified that about a week prior to February 19, Raab approached him at his work table and asked if he signed a union card. Garcia said he did not understand. 12 / Raab said you don't like the job, you signed the union card. Garcia denied this and Raab said you do not like the job, you can take your tools and leave. Raab does not recall any conversation with Garcia regarding the Union.

On February 14, as described more fully below, Respondent had employees sign statements repudiating the Union. That same afternoon Raab questioned Chatman regarding Henrique Rosenbloom, a former employee of Respondent, who had circulated a petition several years ago which employees signed protesting working conditions at Respondent's plant. According to Chatman, Raab said he understood Chatman was going to meet Henrique after work. Chatman inquired where Raab obtained such information. Raab replied, "I heard it." Chatman told Raab what he had heard was not true and suggested that Raab could follow him home if he did not believe Chatman's denial.

12/ Garcia, who speaks limited English, testified in Spanish through an interpreter, however his testimony as to this conversation was in English.

Oldfield testified that on Monday, February 17, Raab approached him and said, "I want to know who approached you from the Union, and who gave you a union card to sign." Oldfield replied that the only thing he signed was the statement Connors gave him the preceding Friday. Raab said, "You can tell me in complete confidence. I will treat it confidentially." Oldfield said he did not know what Raab meant. Raab replied, "It's disloyalty for you; that shows me you have not loyalty for me" and walked away.

Oldfield further testified that on February 18 Raab approached him and Chatman at their work station and said, "The guys tried to get the Union in the shop; I'm going to close down for 2 months."

Flores testified that on February 18, Raab told him he would give him one more chance and asked who gave Flores the paper and who told him to sign. Flores replied that the only thing he signed was the statement given him by Connors.

2. Conclusions

Raab denied having any conversations with employees regarding the Union other than one with Chatman in the presence of Oldfield. He does not specifically deny that he asked Oldfield and Chatman if they signed union authorization cards and he admits that he mentioned closing the plant for a limited period of time. However, he contends that this remark was made in response to Chatman's inquiry as to whether the plant would close in the event of a strike. I do not credit this contention. Raab gave three versions of this conversation. At first he made no mention of any remark regarding the closing of the plant. Then in response to a leading question, he said he did not recall exactly what was said but he did say if he had to, he would close the plant for a while. Then on cross-examination, he testified for the first time that Chatman asked if the plant would

close in the event of a strike and that it was only in response to that question that he mentioned closing the plant. I find it incredible that an employer would forget so critical a circumstance. Even when counsel for Respondent inquired as to why he made such a statement, his only response was "we were just joking."

On the other hand, Chatman, who is still employed by Respondent, impressed me as an honest, forthright witness who was attempting to fairly relate his conversation with Raab, his relationship with Raab and his impression of Oldfield's work. Contrary to Respondent's contention, I do not find his credibility lessened by his testimony that Raab referred to a letter from the National Labor Relations Board on a date prior to the filing of the representation petition. This could mean only that Chatman was mistaken as to the date or it could indicate only that in an attempt to gain information regarding the union activities of employees, Raab was less than truthful in his statements, as indicated by his assertion to other employees discussed below.

I thus find no inherent inconsistency in Chatman's testimony. Further, I note that he was not a union adherent, he is still employed by Respondent and his testimony in other regards tended to be favorable to Respondent. Because I find Oldfield's testimony incredible in other respects discussed below, I credit his version of the conversations between him, Chatman and Raab only to the extent it conforms to Chatman's testimony. Accordingly, I find that Raab interrogated Oldfield and Chatman in violation of Section 8(a)(1) of the Act. I further find that, in the context of this interrogation, and his remarks regarding the Union and his interrogation of other employees, Raab's statement that work was slow and if necessary he would close the plant for a couple of weeks was intended to, and did, convey the idea that such would be in retaliation for the union activities of his employees and was therefore violative of

Section 8(a)(1) of the Act.

Munoz, also impressed me as being honest and forthright in his testimony. Furthermore, he was the most active union adherent among the employees. He knew exactly what form the organizing took. If he were fabricating a conversation with Raab, I am convinced his account would have been in terms of signing authorization cards for the Union not circulating a petition. On the other hand, Raab's previous experience with employee concerted activity had been through a petition signed by his employees. Thus the reference to a petition is plausible coming from Raab, but makes no sense as a statement fabricated by Munoz. In these circumstances, including a consideration of the demeanor of both Munoz and Raab on the witness stand, and other inconsistencies in Raab's testimony. I credit Munoz' testimony as to these conversations. Accordingly, I find that Respondent violated Section 8(a)(1) of the Act by interrogating Munoz, without explanation or assurance against reprisals, regarding his union activity and by Raab's statement that he did not need a union and if the employees wanted one they should "move out." I further find that Raab's statement that he knew that certain named employees had signed for the Union created an impression of surveillance of the employees' union activities and was thus violative of Section 8(a)(1) of the Act.

I also find that Respondent violated Section 8(a)(1) of the Act by interrogating Esquivel, Flores and Garcia regarding their union activities, and by Raab's statement to Garcia in the context of illegal interrogation, that if he did not like his job, he could take his his tools and leave. In so doing, I rely on the credited testimony of Esquivel, Flores and Garcia. For the reasons stated above, I discredit Raab's testimony in this regard. Additionally, Raab's credibility is diminished by the conflecting testimony discussed below, given by him and Respondent's witness Connors as to the

circumstances surrounding the preparation of the statements repudiating the Union which Respondent asked employees to sign.

C. The Solicitation to Sign Statements Rejecting Union Representation

On the morning of February 14, Raab received a letter from the Union stating that it had been designated as bargaining representative by a majority of Respondent's employees. According to Raab, he did not believe this and he felt he had as much right as the Union to take a vote. He therefore instructed his secretary, Lulu Connors, 13/ to prepare a statement to the effect that the employees did not wish to be represented by the Union. According to both Raab and Connors, he instructed her that this was to be a voluntary statement to be signed by an employee if he agreed with it. Raab claims he explained fully to her why he wanted the statements signed and that she alone composed it. Connors testified that Raab composed it and gave her no explanation. In any event, Connors typed the following statement in English.

> I, _____ 14/ do not wish to join Sheet Metal Workers Union, Local #75 or any other organized labor movement and am fully satisfied with the conditions and benefits given by RABCO METAL PRODUCTS, INC.. This is my voluntary and ultimate decision.
> Signed_____Date_____

13/ Also known as Lupita.
14/ The statement given to each employee had his own name written in this space.

According to her, she then gave a statement to each employee stating that he should read it and sign it if he agreed with it, that if he did not agree, he was under no obligation to sign it but in any event, the statement was to be returned to her by the end of the day. Later, she showed the signed statements to Raab. Pepos agrees that this is substantially what she told him. Other employee witnesses give slightly different accounts of the distribution of these statements. Thus David Oldfield testified that when Connors gave him the statement, she said Bernie wants you to sign this document. He signed it and returned it to her. Chatman testified that she told him it was a statement Raab had her prepare, that Raab would like him to sign it but he was under no obligation to do so. She requested that he return the statement to her.

The Spanish speaking witnesses testified that Connors first spoke to some of them in a group and gave them a copy of the statement in English. Someone requested that she translate it into Spanish which she did. Esquivel states that she said Raab wanted them to sign the statement. Garcia testified that she said Raab wanted them to sign it and return it before 4 p.m. that day. Flores testified that she told him she had given the same statement to other employees and that Raab wanted it returned before he clocked out. He denies that she said signing was voluntary. They all signed the statements and returned them to Connors except that Esquivel and Garcia returned their signed statement to Raab.

Since no explanation of the reason for the polling or assurances against reprisals were given employees and since the wording of the statement is more compatible with a solicitation to repudiate the Union than with a non-coercive polling to determine whether the Union had correctly stated the desire of the employees for union representation, I find that by soliciting employee signatures

on these statements, Respondent coercively polled employees as to their union sentiments and unlawfully solicited them to abandon support of the Union.

D. The Discharges

The complaint alleges that on February 19, Respondent unlawfully discharged Flores, Esquivel, Garcia, Oldfield and Hurshal Holliday. 15/ Respondent concedes that Flores was discharged but contends that Garcia, Oldfield and Esquivel were laid off. However, it seems clear from the record that Respondent's use of the term laid-off means only that they were not discharged for cause but allegedly for lack of work and does not imply any intent on Respondent's part to recall them. In fact, Raab states that they do not normally recall employees laid off indefinitely. I therefore find that Esquivel, Flores, Garcia and Oldfield were, in fact, discharged.

Raab testified that work began decreasing around November or December but he wanted to avoid laying off any employees just prior to the Christmas season and Respondent's annual vacation shutdown. 16/ Respondent fabricates kitchen equipment, both stock items sold through a catalog and custom items fabricated to the customer's specifications. According to Raab, custom orders were very low and they were doing mostly stock work. Counsel for General Counsel concedes that Respondent suffered some decrease in business but does not concede that such decline justified the layoff. In any event, it is General Counsel's position that the selection of the persons to be laid off was discriminatorily motivated.

15/ Following Holliday's failure to appear at the hearing, General Counsel's motion was granted to amend the consolidated complaint to delete the allegations as to his discharge.

16/ December 18 through January 2.

Raab testified that he selected the employees for layoff. According to him, Respondent has no policy of seniority and seniority was not a factor in the selection. Rather, he testified, in making the selection he took into consideration such factors as talent, ability, attendance record, relationship with management and relationship with other employees. Raab further testified that the timing of the layoffs was unplanned. His automobile insurance carrier was requiring that Flores be removed as a truckdriver. On February 18, a job applicant came in, said he was a truckdriver and automobile mechanic, so Raab immediately hired him to begin work on February 19. Also, on February 19, one of the welders, Louis Sepulveda, quit. Raab therefore decided this was the time to effect the layoffs he had been contemplating.

In accordance with his usual custom, Raab had Schildknecht and Lupita inform the employees of their layoff. 17/ Thereafter, however, according to both Esquivel and Flores, they talked to Raab regarding their layoffs. Esquivel testified that after Schildknecht gave him his check, he asked Raab how long he would be off work and Raab replied, maybe for a week or two. Flores testified that he asked Raab why he was being laid off. Raab said, lack of work. Flores inquired when there would be work for him. Raab replied, maybe never again. Raab did not mention insurance coverage nor Flores' driving record.

1. Rafael Flores Esquivel

Esquivel began working for Respondent in mid-April 1974. He was employed as a finisher/polisher. According to Raab, he selected Esquivel for layoff because he needed one less polisher and Leadman Miguel German Pepos complained that Esquivel would not follow his instructions. Raab felt there was

17/ Raab testified that he finds it unpleasant to tell employees they are being laid off so he usually has someone else convey the information.

a conflict of personalities so he moved Esquivel to another part of the plant thinking that they would work together better if physically separated. This strategy was unsuccessful so he was laid off because of his uncooperative attitude. Pepos testified that he was Esquivel's leadman for about a year or a year and a half, but that this problem of not following instructions only began about 6 months before his layoff. Additionally, according to Pepos, Esquivel's work was not good. He made mistakes more often than the other polishers and when he made a mistake instead of correcting it, he would blame Pepos for the mistake. However, Raab does not assert poor work as a reason for his layoff. Raab explained that he did not discharge Esquivel earlier because 1974 was a busy year, that it was not that easy to get good employees, that a new employee might not be better so he thought he would keep the employee he knew.

Esquivel denies that he had any conflict with Pepos. Further it is his undenied testimony that during his last 6 months employment by Respondent he received two raises, one in August 1974 and one in January or February 1975. Esquivel testified that in August 1974, Esquivel left Respondent's employ without notice to take another job. About 2 weeks later, Esquivel returned to Respondent's plant for his check. Raab asked why he had not returned to work. Esquivel said he had a slight mishap with immigration. Raab asked him to return the following Monday for his check, which he did. On Monday, Esquivel told Raab he had found other work at a higher rate of pay. Raab asked Esquivel what wage he would like to receive. Esquivel replied $3.50 an hour. Raab said all right, go back to work. Esquivel returned to Respondent's employ at $3.50 an hour. In January or February 1975, he received a 15 cents an hour raise. 18/ Raab admits that Esquivel was given a raise in

18/ Esquivel's rate of pay at the time he quit was $2.65 an hour. His new job paid $3.00 an hour. He returned to Respondent's employ at $3.50 an

the summer of 1974 after he had missed work for about a week. When he first testified, on cross-examination, he stated that he gave Esquivel a raise because he requested one but denied that the wage was granted in order to induce him to return to work. On surrebuttal, Raab testified that Esquivel requested more money, that he needed another polisher because work was heavy so he agreed to increase his pay.

2. George Olguin Garcia

At the time of his discharge Garcia had been employed by Respondent as a helper for more than 3 years. Raab testified that one of the considerations in selecting him for layoff was his attendance record which fluctuated according to his current girlfriend. Another factor was communication, i.e. he would say he understood instructions when he didn't and his mistakes were very costly and were numerous and constant. There is no evidence as to exactly who had this difficulty in communicating with Garcia, and when asked for details as to these numerous and costly mistakes, the only instance Raab could recall occurred in December 1974 or January 1975, when some shelves installed by Garcia fell down. When asked when Garcia first made a mistake that Raab considered as costly, Raab could not recall. Raab also testified that during the last couple of months prior to his layoff, Garcia's attendance was very bad. However, the only specific instance mentioned was that Garcia had missed a day or a half day within the last few weeks of his employ. It is unclear from his testimony whether this was a total figure or whether he meant a day or a half day each week. No record was offered to substantiate or clarify this contention.

18/ (Cont.) hour and when he was laid off he was making $3.65 an hour.

Garcia's undenied testimony is that the only time he was reprimanded for poor attendance was about 2 years before his discharge when he had some trouble with his girlfriend. Garcia also testified that he was laid off for 2 days in January and for 2 days in February. On each occasion, Connors told him he was being sent home because work was slow.

3. David Oldfield

Oldfield was employed by Respondent from April 19, 1972 to February 19, 1975. At the time of his layoff he was a brake operator helper. As such, his duties were to set up the machine with the dies and to assist brake operator Dennis Chatman in making parts. Prior to his employ by Respondent, he had no experience in sheet metal work.

According to Raab, he selected Oldfield for layoff because he had not progressed at a rate deemed desirable. In Raab's opinion, after a year or at most a year and a half as a power brake operator helper, one should be able to work as a brake operator. However, according to Raab, when Chatman was on vacation or absent for some reason, Oldfield could not operate the power brake. During the first year that Oldfield worked as a helper on the power brake, employee Jack Wand operated the brake when Chatman was on vacation. Raab testified that in July 1974 when Chatman last was on vacation, he (Raab) thought that Oldfield should be able to operate the power brake so he assigned him as brake operator. On the first day, about 2-1/2 hours after the shift started, Raab asked Oldfield how he was doing. Oldfield allegedly said, "I can't handle it, you'd better get someone else." So Raab assigned Wand as operator and Oldfield resumed his job as helper. Raab contends that Oldfield was too expensive for a helper 19/ and could not be used as

19/ At the time of his layoff, Oldfield was paid $3.75 or $3.90 an hour. His replacement received 60 or 70 cents less an hour.

anything else. Upon Oldfield's discharge, he was immediately replaced by Manuel Boniel, a helper in another area with less seniority than Oldfield.

The testimony of Chatman and Wand tend to corroborate Raab's contention that Oldfield lacked the skill to operate the power brake. Oldfield first testified that at the time of his discharge he was capable of operating the brake and that, in fact, he did operate it during the entire time that Chatman was on vacation in July 1974. However, on rebuttal, he testified as to certain conversations he had with Wand in July 1974, when Chatman was on vacation. It is quite apparent from this testimony that, contrary to Oldfield's prior testimony, Wand operated the power brake during Chatman's vacation. Such a direct conflict in a critical aspect of his testimony completely shatters Oldfield's credibility and I credit his testimony only to the extent that corroboration can be found in the record. Accordingly, I find that at the time of his discharge Oldfield was incapable of operating the power brake on a regular, day-to-day basis.

4. Arturo Flores

Arturo Flores worked for Respondent for almost 2 years as a helper and truckdriver. Raab testified that Flores' work as a truckdriver was satisfactory but that he did not pay attention to what he did as a helper and that everything he did in the shop had to be redone. Raab estimated that on an average during a week Flores would spend roughly 50 to 60 percent of his time making pickups and deliveries and 40 to 50 percent of his time in the shop as a helper. According to Raab, Flores was selected for layoff because of insurance problems.

Rochele Nagel, an employee of the insurance agency that handles Respondent's automobile insurance, testified that on October 26, 1974, she received correspondence from Wilshire Insurance Company, Respondent's insurance carrier, that they would not continue coverage on Flores because of

monthly sales continued to decline. 21/ I find Respondent's evidence in this regard inconclusive in view of the undisputed testimony that in the past when work was slow, Respondent concentrated on producing stock equipment for inventory and the absence of anything in the record to indicate whether this decline in sales was different from previous years.

The timing of the discharges is highly suspicious. Raab contends that he decided to lay off several employees because work started to decline in November and December 1974, but he did not effect the layoffs then because he did not want to lay off anyone just prior to Christmas or deprive anyone of vacation. Respondent's figures as to its monthly sale does not support this contention. Respondent's sales did not begin decreasing in November or December 1974. Its biggest drop in sales occurred in August 1974, yet respondent hired two additional employees. Sales continued to drop in September and October 1974, and Respondent hired three additional employees in October. Its second largest decline in monthly sales was in January. Yet Respondent still did not effect the layoffs it was allegedly contemplating nor does it attempt to explain why the layoffs were not made then. Sales actually increased in February. The only apparent change from January to February was that Respondent became aware of its employees' union activities.

As set forth above, upon becoming aware of its employees' union activities, Respondent embarked on a campaign of conduct aimed at dissuading its employees from continued support of the Union. Thus Respondent coercively interrogated employees

---

21/ Respondent's monthly income was:

July 1974	$161,649.51	Jan. 1975	$ 92,978.78
Aug. 1974	133,051.92	Feb. 1975	102,305.64
Sept 1974	130,505.74	Mar. 1975	88,591.11
Oct. 1974	122,960.42	Apr. 1975	80,834.50
Nov. 1974	117,897.96	May 1975	93,484.50
Dec. 1974	119,186.52	June 1975	72,783.80

as to their union activities and that of fellow employees, threatened to close its plant if employees persisted in union activities and coerced its employees to sign statements that they did not wish union representation and were completely satisfied with their working conditions.

Furthermore, Vince's discharge and Raab's statement to him that he was being discharged because he was advocating union representation indicates Respondent's willingness to discharge employees in order to abort their union activities. The persons selected for discharge were those toward whom the illegal interrogations were directed. The fact that Munoz and Chatman were not also laid off does not negate the inferences to be drawn from such selection. Both Munoz and Chatman were highly skilled employees whose precipitous layoff might create problems for Respondent. Moreover, Chatman was not a union adherent and his conversation with Raab, set forth above, indicated as much. Munoz, the most active union adherent, 22/ was in fact laid off in April. Also, it is well settled that an employer need not discharge every union adherent to achieve its goal and the fact that all were not discharged does not in itself negate a finding of illegal motivation. The Great Atlantic and Pacific Tea Company, 210 NLRB No. 89; Broyhill Company, 210 NLRB No. 37.

Also indicative of an illegal motivation for the discharge of the alleged discriminatees is the unconvincing and pretextuous nature of Respondent's alleged reasons for their selection. Thus Raab contends that Garcia made numerous and costly mistakes. In fact, at one point he characterized the mistakes as constant, yet he could recall only one

22/ There is no evidence that Respondent had knowledge of the union activities of Mario Delgado, another active union adherent.

specific instance where Garcia had made a mistake. Raab also contends that Garcia's absenteeism was a factor yet Respondent offered no records to support this claim and Garcia's testimony that he was reprimanded for absenteeism only once, 2 years prior to his layoff is undenied.

As to Esquivel, Respondent does not explain why if Esquivel was such an unsatisfactory employee, he was given an 85 cents an hour raise in August 1974 to induce him to return to Respondent's employ. Even assuming that the unsatisfactory nature of his attitude and work developed after his return, there is no explanation as to why he received a 15 cents an hour raise in January.

As to Oldfield, the alleged reason for his selection goes back to July 1974, when he could not operate the power brake during Chatman's vacation. Yet despite Oldfield's failure to progress at a rate deemed desirable by Raab, he was not replaced as helper at the power brake until Raab became aware of the union activity. The contention that Oldfield was too expensive for a helper is unconvincing. He was never paid as anything but a helper and insofar as the record reveals, it was not often that Chatman was away from the job.

Flores' undenied testimony is that the only time Raab mentioned the insurance problem to him was in December when Raab told him to drive carefully because the insurance company did not want to cover him because he had too many tickets. Certainly Raab knew at this time that the insurance company was demanding Flores' exclusion and it was only after the layoff that Raab received the letter threatening cancellation. Furthermore, since Flores was spending at least 40 percent of his time in the shop and Respondent had someone assigned as a supplemental driver who drove when Respondent utilized a rented truck, the insurance problem does not seem a sufficient reason for discharging him. Furthermore, the only reason given Flores for his discharge was lack of work.

I discount Raab's statement that everything done by Flores in the shop had to be redone. This assertion was not substantiated and since Flores spent 40 to 50 percent of his time in the shop, I find it incredible that such total incompetence would be tolerated for the almost 2 years that Flores was in Respondent's employ.

Accordingly, in all of the circumstances, I find that Flores, Oldfield, Esquivel and Garcia were discharged to discourage union activities by Respondent's employees, in violation of Section 8 (a)(3) and (1) of the Act. Even assuming that the insurance problem and Oldfield's inability to operate the power brake played some part in their selection for discharge, I find that a motivating factor was also to discourage union activities. It is well established that if one of the motivating factors for a discharge is to discourage union activity, the discharge is violative of Section 8 (a)(3) and (1) of the Act. Broyhill Company, supra.

Conclusions of Law

1. Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. By coercively interrogating employees about their union activities and sympathies, by threatening employees with plant closure because they engaged in union activities, by threatening employees with layoff and termination because they engaged in union activities, by creating the impression of surveillance of employees' union activities and by soliciting employees to abandon support of, or to reject representation by the Union, Respondent has interfered with, restrained and coerced its employees in the exercise of their rights under Section 7 of the Act and has thereby

engaged in unfair labor practices within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act.

4. By discharging its employees Anthony George Vince, Arturo Flores, David Oldfield, George Olguin Garcia and Rafael Flores Esquivel, Respondent has engaged in unfair labor practices in violation of Section 8(a)(1) and (3) of the Act.

The Remedy

Having found that Respondent has engaged in certain unfair labor practices, it will be recommended that the Respondent be ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

Having found that Respondent discharged Anthony George Vince, Arturo Flores, Rafael Flores Esquivel, George Olguin Garcia and David Oldfield in violation of Section 8(a)(1) and (3) of the Act, it is recommended that the Respondent offer each of them immediate and full reinstatement to his former job, or, if such positions no longer exist, to substantially equivalent positions, without prejudice to his seniority and other rights and privileges, and make each of them whole for any loss of earnings he may have suffered by reason of such discrimination, by payment of a sum of money equal to that which he normally would have earned as wages from the date of discharge to the date of said offer of reinstatement, less his net earnings during such period, with backpay computed on a quarterly basis in the manner established by the Board in F.W. Woolworth Company, 90 NLRB 289, and with interest thereon as prescribed by the Board in Isis Plumbing & Heating Co., 138 NLRB 716.

As unfair labor practices committed by the Respondent are of a character striking at the very heart of the Act, I shall recommend that Respondent be ordered to cease and desist from infringing in

any other manner upon the rights guaranteed in Section 7 of the Act.

Upon the foregoing findings of fact, conclusions of law, and the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended: 23/

ORDER

Respondent, Rabco Metal Products, Inc., its officers, agents, successors and assigns, shall:

1. Cease and desist from:

(a) Discharging or otherwise discriminating against employees because of their union activities.

(b) Coercively interrogating employees about their union activities and sympathies.

(c) Threatening employees with layoff, termination and plant closure because of their union activities.

(d) Soliciting employees to abandon support of, or to reject representation by the Union.

(e) Creating the impression of surveillance of employees' union activities.

(f) In any other manner interfering with,

23/ In the event no exceptions are filed as provided by Section 102.46 of the Rules and Regulations of the National Labor Relations Board the findings, conclusions, and recommended Order herein shall, as provided in Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

restraining, or coercing its employees in the exercise of their rights guaranteed under Section 7 of the Act.

2. Take the following affirmative action which is necessary to effectuate the policies of the Act:

(a) Offer Anthony George Vince, George Olguin Garcia, Rafael Flores Esquivel, Arturo Flores and David Oldfield immediate and full reinstatement to their former positions, or if such positions no longer exists, to substantially equivalent positions without prejudice to seniority or other rights and privileges.

(b) Make each of the employees named above in subparagraph 2(a) whole for any loss of earnings suffered by reason of the discrimination against them, in the manner set forth in the section herein entitled "The Remedy."

(c) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports and all other records necessary to analyze the amount of backpay due and the right of reinstatement under the terms of this Order.

(d) Post at its place of business at Los Angeles, California, copies of the attached notice marked "Appendix." 24/ Copies of said notice, on forms provided by the Regional Director for Region

24/ In the event that the Board's Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall be changed to read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

21, after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director for Region 21 in writing, within 20 days from the receipt of this Decision, what steps Respondent has taken to comply herewith.

IT IS FURTHER ORDERED that Case No. 21-RC-14083 be remanded to the Regional Director to open and count the ballots of George Olguin Garcia, Rafael Flores Esquivel, Anthony George Vince, David Oldfield and Arturo Flores in such a manner as not to compromise the secrecy of the ballot cast by each said person and to issue a revised tally of ballots and to take such further action as then becomes appropriate.

Dated: September 9, 1975

_____
Earldean V.S. Robbins
Administrative Law Judge

APPENDIX

After a trial in which all sides had a chance to give evidence, the National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post this notice. We intend to abide by the following:

The Act gives all employees these rights:

To engage in self-organization;
To form, join, or help unions;
To bargain collectively through representatives of their own choosing;
To act together for collective bargaining or other mutual aid or protection;
To refrain from any or all these things.

WE WILL NOT do anything that interferes with, restrains, or coerces you with respect to these rights. More specifically,

WE WILL NOT lay off or discharge employees because they engage in any of the activities set forth above.

WE WILL NOT interrogate employees concerning their union activity or that of other employees.

WE WILL NOT threaten employees with layoff, termination or plant closure because they engage in any of the activities set forth above.

WE WILL NOT solicit employees to sign documents renouncing the Union, or to otherwise repudiate the Union.

WE WILL NOT create the impression that we are keeping employees' union activities under surveillance.

WE WILL offer Anthony George Vince, Arturo Flores, Rafael Flores Esquivel, George Olguin Garcia and David Oldfield immediate and full reinstatement to their former jobs or if those positions no longer

exist, to substantially equivalent positions, and WE WILL compensate each of them with interest, for any loss of pay they may have suffered because of our discrimination against them.

RABCO METAL PRODUCTS, INC.
(Employer)

Dated_____ By_____
(Representative) (Title)

Eastern Columbia Bldg.
849 South Broadway, Los Angeles, CA 90014.
Telephone: (213) 688-5229.

EXHIBIT "I"

WESTERN UNION MAILGRAM

WESTERN UNION MAILGRAM

MGMLSAT HSB
2-049237E007 01/07/76
ICS IPMRNCZ CSP
2136243330 MGM TDRN LOS ANGELES CA
170 01-07 1032P EST

WILFORD W. JOHANSEN, DIRECTOR,
NLRD REGION 21
849 South Broadway
Los Angeles CA 90012

REFERENCE RABCO METAL PRODUCTS INC AND SHEET METAL WORKERS UNION LOCAL 75, CASES 21-CA-13413-1, 21-CA-13413-2 AND 21-RC-14083. EMPLOYER RESPECTFULLY REQUESTS BOARD'S RECONSIDERATION OF DECISION AND ORDER DATED DECEMBER 23, 1975 AND GRANTING OF ADDITIONAL HEARING. EMPLOYER HAS NEW EVIDENCE NOT AVAILABLE TO HIM AT TIME OF ORIGINAL HEARING WHICH PURPORTS TO SHOW INDIVIDUALS ORDERED REINSTATED WERE CAUSED TO BE EMPLOYED AT BETTER PAYING JOBS ELSEWHERE AS INDUCEMENT TO ASSURE ATTENDANCE AT ELECTION AND FAVORABLE VOTE. SUCH ACTIVITY WOULD BE VIOLATION OF SECTIONS 7 AND 8(B) AND OFFEND THE PROVISIONS OF SECTION 9 WHICH CONTEMPLATE A FAIR ELECTION. REQUEST TO RECONSIDER IS MADE IN THIS MANNER SINCE BALLOTS ARE SCHEDULED TO BE COUNTED FRIDAY JANUARY 9 AT 10AM AT REGIONAL OFFICE 849 SOUTH BROADWAY LOS ANGELES, AND IT IS REQUESTED THAT THIS STEP BE STAYED. FORMAL PETITION WITH SUPPORTING DOCUMENTATION WILL BE SUBMITTED PROMPTLY.

A COPY OF THIS TELEGRAM IS BEING SERVED ON RICHARD DOUGLAS BREW CARE OF ROSE KLEIN AND MARIAS SUITE 850 ROOSEVELT BLDG LOS ANGELES 90017 AND WILFORD W. JOHANSEN, DIRECTOR, NLRB, REGION 21, 849 SOUTH BROADWAY LOS ANGELES 90012.

EDDY S. FELDMAN, ATTORNEY SUITE 600 700 SOUTH FLOWER LOS ANGELES CA 90017 213 624-3339.

22:33 EST MGMLSAT HSB

EXHIBIT I
-1-

EXHIBIT "J"

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

NLRB v. Rabco Metal Products, Inc.
ORDER DENYING MOTION

Los Angeles, CA

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

RABCO METAL PRODUCTS, INC. AND SHEET METAL WORKERS' FOOD SERVICE EQUIPMENT DIVISION, INTERNATIONAL ASSOCIATION LOCAL NO. 75, SHEET METAL WORKERS' INTERNATIONAL ASSOCIATION, AFL-CIO	Cases 21-CA-13413-1 21-CA-13413-2 21-RC-14083

ORDER DENYING MOTION

On December 23, 1975, the National Labor Relations Board issued a Decision and Order 1/ in the above entitled proceeding, finding that the Respondent had engaged in and was engaging in certain unfair labor practices in violation of Section 8(a)(1) and (3) of the National Labor Relations Act, as amended, and ordering that the Respondent cease and desist therefrom and take certain affirmative action to remedy such unfair labor practices. In addition, the Board ordered that the representation proceeding be remanded to the Regional Director for the opening and counting of the ballots of the unlawfully discharged employees, George Olguin Garcia, Rafael Flores Esquivel, Anthony George Vince, David Oldfield and Arturo Flores, and for the issuance of a revised tally of ballots.

Thereafter, on January 8, 1976, the Respondent made a telegraphic request asking the Board to reconsider its decision and Order; grant an additional hearing; and stay the counting of ballots which was scheduled for January 9, 1976, at the Regional Office. The Respondent based its request on grounds that new evidence not previously available at the original hearing would show that individuals ordered reinstated were caused to be employed at better paying jobs elsewhere as inducement to assure their

1/ 221 NLRB No. 208.

attendance at the election and a favorable vote, and that such activity would be a violation of Sections 7 and 8(b), and offend the provisions of Section 9 which contemplate a fair election.

The Respondent further asserted that a formal petition with supporting documentation would be submitted promptly.

The Board having duly considered the matter, and the Respondent having failed to submit a formal petition with supporting documentation, accordingly,

IT IS HEREBY ORDERED that the Respondent's request for reconsideration and stay of the counting of the ballots be, and it hereby is, denied as lacking in merit.

Dated, Washington, D.C., February 4, 1976.

By direction of the Board:

/s/ John C. Truesdale
Executive Secretary

EXHIBIT "K"

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

NLRB v. Rabco Metal Products, Inc.

REVISED TALLY OF BALLOTS

FORM NLRB-4168
(10-70)

UNITED STATES OF AMERICA

NATIONAL LABOR RELATIONS BOARD

RABCO METAL PRODUCTS, INC. Employer	Case No. 21-RC-14083
and	Date Issued January 9, 1976
SHEET METAL WORKERS' INTERNATIONAL ASSOCIATION, LOCAL UNION NO. 75, FOOD SERVICE EQUIPMENT DIVISION, AFL-CIO Petitioner	Type of Election: RD Direction

REVISED TALLY OF BALLOTS
(Counting of Challenged Ballots)

The undersigned agent of the Regional Director certifies that the results of counting the challenged ballots directed to be counted by the Regional Director, Region 21, on January 9, 1976, and the addition of these ballots to the original Tally of Ballots, executed on April 25, 1975, were as follows:

	ORIGINAL TALLY	CHALLENGED COUNTED	FINAL TALLY
Approximate number of eligible voters	23		
Void ballots	0		
Votes cast for: Petitioner	6	5	11
Votes cast for:			
Votes cast for:			
Votes cast against participating labor organization(s)	8	0	8

EXHIBIT K

	ORIGINAL TALLY	CHALLENGED COUNTED	FINAL TALLY
Valid votes counted	14		19
Undetermined challenged ballots	8		1
Valid votes counted plus challenged ballots	22		20
Sustained challenges (voters ineligible)			2

The remaining undetermined challenged ballots, if any, shown in the Final Tally column are (not) sufficient to affect the results of the election.

A majority of the valid votes plus challenged ballots as shown in the Final Tally column has been cast for Petitioner.

For the Regional Director
Andrew J. Steb

The undersigned acted as authorized observers in the counting and tabulating of ballots indicated above. We hereby certify that this counting and tabulating, and the compilation of the final tally, were fairly and accurately done, and that the results were as indicated above. We also acknowledge service of this Tally.

FOR EMPLOYER

FOR PETITIONER
Raymond R. Perez /s/

EXHIBIT "L"

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

NLRB v. Rabco Metal Products, Inc.
CERTIFICATION OF REPRESENTATIVE

FORM NLRB-4279 RC-RM-RD
(3-72)

UNITED STATES OF AMERICA

NATIONAL LABOR RELATIONS BOARD

RABCO METAL PRODUCTS, INC.) Employer)	TYPE OF ELECTION
and)	RD Direction
SHEET METAL WORKERS') INTERNATIONAL ASSOCIATION) LOCAL UNION NO. 75, FOOD) SERVICE EQUIPMENT DIVI-) SION, AFL-CIO) Petitioner)	Case No. 21-RC-14083

CERTIFICATION OF REPRESENTATIVE

An election having been conducted in the above matter under the supervision of the Regional Director of the National Labor Relations Board in accordance with the Rules and Regulations of the Board; and it appearing from the Tally of Ballots that a collective bargaining representative has been selected; and no objections having been filed to the Tally of Ballots furnished to the parties, or to the conduct of the election, within the time provided therefor;

Pursuant to authority vested in the undersigned by the National Labor Relations Board, IT IS HEREBY CERTIFIED that a majority of the valid ballots have been cast for SHEET METAL WORKERS' INTERNATIONAL ASSOCIATION, LOCAL UNION NO. 75, FOOD SERVICE EQUIPMENT DIVISION, AFL-CIO,

and that, pursuant to Section 9(a) of the National Labor Relations Act, as amended, the said labor organization is the exclusive representative of all the employees in the unit set forth below, found to be appropriate for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment.

EXHIBIT L
-1-

UNIT: INCLUDED: All employees of the Employer, including fabricators, installers, shipping and receiving employees, truckdrivers, and leadmen.

EXCLUDED: All office clerical employees, professional employees, guards, watchmen, and supervisors as defined in the Act.

Signed at Los Angeles, California
On the 6th day of February 1976

(Seal) On behalf of

National Labor Relations Board

/s/ WILFORD W. JOHANSEN
Regional Director, Region 21
National Labor Relations Board

EXHIBIT "M"

No. 76-1304 & 76-3132
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NLRB v. Rabco Metal Products, Inc.,

FILED NOV. 30, 1977, Emil E. Melfi, Jr., Clerk, U.S. Court of Appeals.

[MEMORANDUM]

No. 76-1304 & 76-3132
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD,
Petitioner,
-v-
RABCO METAL PRODUCTS, INC.,
Respondent.

(FILED NOV. 30, 1977
Emil E. Melfi, Jr.
(Clk. U.S.Ct.Apps.)

[MEMORANDUM]

On Application for Enforcement of a Decision and Order of the National Labor Relations Board.

Before: HUFSTEDLER and SNEED, Circuit Judges, and PALMIERI,* District Judge.

The National Labor Relations Board (Board) has petitioned for enforcement of two orders against Rabco Metal Products, Inc., (Rabco). We enforce the orders.

The standard of review is clear. "The findings of the Board should not be disturbed if on the record as a whole, there is substantial evidence to support the findings." NLRB v. International Longshoremen's and Warehousemen's Union, 514 F.2d 481, 483 (9th Cir. 1975), citing Universal Camera Corp. v. NLRB, 340 U.S. 474, 491 (1951).

Credibility Determination

The Administrative Law Judge credited the testimony of all but one of Rabco's employees. She did not credit the testimony of Bernard Raab, owner and operator of Rabco. Credibility determinations will not be disturbed unless a clear preponderance of the evidence convinces they are incorrect. NLRB v. International Longshoremen's and Warehousemen's Union, supra. at 483.

---

* Honorable Edmund L. Palmieri, Senior United States District Judge for the District of New York, sitting by designation.

Raab's categorical denial of all but one of the conversations testified to by his employees is inherently suspect. Coupled with other inconsistencies in his testimony, there is sufficient evidence in the record to find the credibility determination correct.

Coercive Interrogation

Interrogation is unlawful when it is "expressly or implicitly threatening or coercive." Santa Fe Drilling Co. v. NLRB, 416 F.2d 725, 728 (9th Cir. 1969). Testimony indicated that Raab was known to be hostile to union members. On numerous occasions he questioned his employees concerning the signing of union cards and indicated they could leave if they were dissatisfied. The evidence is sufficient to find that the interrogations were coercive in violation of Section 8(a)(1). See NLRB v. Hotel Conquistador, Inc., 398 F.2d 430, 434 (9th Cir. 1968).

Coercive Poll

Resonable polling is not a violation of §8(a)(1) if it is conducted in accordance with the requirements set forth in Stuksnes Construction Co., 165 NLRB No. 102, 65 L.R.R.M. 1385 (1967). NLRB v. Super Toys, Inc., 486 F.2d 180, 182 (9th Cir. 1972).

Raab instructed his secretary/bookkeeper to pass out a form statement to his employees to determine their intentions regarding the union.1/ The record demonstrates that the criteria of Stuksnes was not in the conducting of this poll. The purpose of the poll was not communicated and assurances against reprisal were not given. The employees were not polled by secret ballot, and the employer had already created a coercive atmoshere at the time the statement was circulated. The finding that the taking of the poll

1/ I, (name), do not wish to join Sheet Metal Workers union Local #75 or any other organized labor movement and am fully satisfied with the conditions and benefits given by RABCO METAL PRODUCTS, INC. This is my voluntary and ultimate decision.

Signed_____ Date_____

was conducted in such manner as to violate §8(a)(1) is supported by the evidence.

Discharges

The Board must show that an employee would not have been discharged but for his union activity in order to establish a violation of §8(a)(3). A business reason for a discharge cannot be asserted as a pretext if in fact the discharge was motivated by the employee's union activities. NLRB v. Klaue, 523 F.2d 410, 413 (9th Cir. 1975).

Rabco contends that the discharges of employee Oldfield, Garcis, Esqivel and Flores on February 19, 1975, were for good cause, i.e., a decline in his business and their unsatisfactory work performance. The reasons given by Raab for not previously discharging these employees are not persuasive. The delay and the ultimate timing of these discharges were at least partially motivated by their union activity, in violation of §8(a)(3).

Employee Vince was discharged in November, 1974, allegedly for poor work. Vince testified that Raab told him he was being discharged because of his union activities. The ALJ credited the testimony of Vince and not Raab. The evidence is sufficient to disturb this determination. In view of the subsequent events and discharges, the record as a whole supports the Board's finding that employee Vince was also discriminatorily discharged in violation of §8(a)(3).

Objections to Elections

Rabco contends the Board abused its discretion in overruling three of the six objections filed by Rabco after the election held April 25, 1975.

Objection No. 1 concerned a leaflet distributed by the union two days before the election. While the leaflet was somewhat misleading as to the wages and benefits, Rabco employees could expect, Rabco had an opportunity to reply and the reply effectively rebutted any distortion in the leaflet. NLRB v. G.K. Turner Associates, 457 F.2d 484 (9th Cir. 1972).

Objection No. 4 specified that the discharged Rabco employees were given jobs by the union at higher than normal rates of pay, thereby giving a false impression to Rabco employees concerning union wages and benefits. The Board's investigation revealed that employee Odlfield told a Rabco employee that he was making $4.65 per hour as a power brake helper, an amount substantially higher than the normal rate of pay for this position. The Board did not find this isolated incident to be sufficient evidence to require voiding of the election and overruled this objection. Rabco contends that there was corroborating evidence which the Board failed to consider. However, it has never substantiated this assertion by the submission of any offer of proof. In the absense of such proof, The Board is entitled to rely on the report of the Regional Director. NLRB v. Kenny, 488 F.2d 774 (9th Cir. 1974).

Objection No. 5 concerns the Board's failure to provide a hospitalized employee with an absentee ballot. Since we affirm the Board's findings as to the discharged employees' eligibility to vote, the filing of an additional ballot against the union would not change the election results. Thus, we do not need to reach this issue.

We have examined all of Rabco's arguments and find them to be without merit.

The orders are enforced.

—oOo—

EXHIBIT "N"

No. 76 - 1304
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NLRB v. Rabco Metal Products, Inc.
Received December 12, 1977, Emil E. Melfi, Jr., Clerk, U.S. Court of Appeals. Filed 2/17/77; Docketed 12/12/77.

NLRB#21-CA 13413—1, 13413—2, 21—RC—14083.

[JUDGMENT]

No. 76-1304
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD, Petitioner, v. RABCO METAL PRODUCTS, INC., Respondent.	RECEIVED Emil E. Melfi, Jr., (Clk. U.S.Ct.APPs.) Filed 2/17 _____ Docketed 12/12____ Date Initial NLRB#21-CA13413-1, 13413-2, 21-RC-14083

JUDGMENT

Before: HUFSTEDLER and SNEED, Circuit Judges, and PALMIERI,* District Judge.

THIS CAUSE came on to be heard upon the application for enforcement of an order of the National Labor Relations Board issued December 23, 1975, against Respondent, Rabco Metal Products, Inc., Los Angeles, California, its officers, agents, successors, and assigns. The Court heard argument of respective counsel on November 9, 1977, and has considered the briefs and transcript of record filed in this cause. On November 30, 1977, the Court, being fully advised in the premises, issued its memorandum granting enforcement of the Board's Order. In conformity therewith, it is hereby

ORDERED AND ADJUDGED by the Court that Respondent, Rabco Metal Products, Inc., Los Angeles, California, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:
   (a) Discharging or otherwise discriminating against employees because of their union activities.
   (b) Coercively interrogating employees about about their union activities and sympathies.

*Honorable Edmund L. Palmieri, Senior United States District Judge for the District of New York, sitting by designation.

(c) Threatening employees with layoff, termination and plant closure because of their union activities.

(d) Soliciting employees to abandon support of, or to reject representation by Sheet Metal Workers' Food Service Equipment Division, International Association, Local No. 75, Sheet Metal Workers' International Association, AFL—CIO.

(e) Creating the impression of surrveillance of employees' union activities.

(f) In any other manner interferring with, restraining, or coercing its employees in the execise of their rights guaranteed under §7 of the National Labor Relations Act (hereinafter called the Act).

2. Take the following affirmative action which the Board has found necessary to effectuate the policies of the Act:

(a) Offer Anthony George Vince, George Olguin Garcia, Rafael Flores Esquivel, Arturo Flores and David Oldfield immediate and full reinstatement to their former positions, or if such positions no longer exists, to substantially equivalent positions without prejudice to seniority or other rights and privileges.

(b) Make each of the employees named above in sub ¶ 2(a) whole for any loss of earnings suffered by reason of the discrimination against them, in the manner set forth in the section of the Administrative Law Judge's Decision entitled "The Remedy", (a copy of which is attached hereto as Appendix A).

(c) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports and all other records necessary to analyze the amount of backpay due and the right of reinstatement under the terms of this judgment.

(d) Post at its place of business at Los Angeles, California, copies of the attached notice marked "Appendix B". Copies of said notice, on forms provided by the Regional Director for Region 21 of the National Labor Relations Board (Los Angeles, California), after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure tha said notices are not altered, defaced, or covered by any other material.

(e) Notify the aforesaid Regional Director in writing, within 20 days from the receipt of this Judgment, what steps Respondent has taken to comply herewith.

Costs in this Court in favor of petitioner and against respondent.

Briefs $233.36, Repro.records $57.74

Total $291.10

SO ORDERED:

Endorsed, Judgment Filed and Entered

/s/ SHIRLEY M. HUFSTEDLER
CIRCUIT JUDGE

/s/ JOSEPH T. SNEED
CIRCUIT JUDGE

/s/ EDMUND L. PALMIERI
SENIOR U.S. DISTRICT JUDGE

/s/Emil E. Melfi
Clerk

/A TRUE COPY
Attest
A TRUE COPY
ATTEST FEB 17, 1978
Emil E. Melfi, Jr., Clerk
of Court, by: /s/ Pat Namokawa,
Deputy Clerk

FILED
FEB 17 1978

EMIL E. MELFI, JR.
Clerk, U.S. Court of Appeals

The Remedy

Having found that Respondent has engaged in certain unfair labor practices, it will be recommended that the Respondent be ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

Having found that the Respondent discharged Anthony George Vince, Arturo Flores, Rafael Flores Esquivel, George Olguin Garcia and David Oldfield in violation of §8(a)(1) and (3) of the Act, it is recommended that the Respondent offer each of them immediate and full reinstatement to his former job, or, if such positions no longer exist, to substantially equivalent positions, without prejudice to his seniority and other rights and privileges, and make each of them whole for any loss of earnings he may have suffered by reason of such discrimination, by payment of a sum of money equal to that which he normally would have earned as wages from the of discharge to the date of reinstatement, less his net earnings during such period, with backpay computed on a quartely basis in the manner established by the Board in F.W. Woolworth Company, 90 NLRB 289, and with interest thereon as prescribed by the Board in Isis Plumbing & Heating Co., 138 NLBR 716.

As the unfair labor practices committed by the Respondent are of a character striking at the very heart of the Act, I shall recommend that Respondent be ordered to cease and desist from infringing in any other manner upon the rights guaranteed in §7 of the Act.

[APPENDIX A, PAGE 16.]

JD-(SF)-180-75

POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD.

After a trial in which all sides had a chance to give evidence, the National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post this notice. We intend to abide by the following:

The Act gives employees these rights:

To engage in self-organization;

To form, join, or help unions;

To bargain collectively through representatives of their own choosing;

To act together for collective bargaining or other mutual aid or protection;

To refrain from any or all these things.

WE WILL NOT do anything that interferes with, restrains, or coerces you with respect to these rights. More specifically,

WE WILL NOT lay off or discharge employees because they engage in any of the activities set forth above.

WE WILL NOT interrogate employees concerning their union activity or that of other employees.

WE WILL NOT threaten employees with layoff, termination or plant closure because they engage in any of the activities set forth above.

WE WILL NOT solicit employees to sign documents renouncing the Union, or to otherwise repudiate the Union.

WE WILL NOT create the impression that we are keeping employees' union activities under surveillance.

////

[Appendix B, Cont. p. 6.]

APPENDIX B (Continued)

WE WILL offer Anthony George Vince, Arturo Flores, Rafael Flores Esquivel, George Olguin Garcia and David Oldfield immediate and full reinstatement to their former jobs or if those positions no longer exist, to substantially equivalent positions, and WE WILL compensate each of them with interest, for any loss of pay they may have suffered because of our discrimination against them.

RABCO METAL PRODUCTS, INC.
(Employer)

Dated_____ By_____
(Representative)

_____
(Title)

City Nat'l Bank Bldg., 24th Floor, 606 South Olive Street, Los Angeles, CA 90014.

Telephone: (213) 688-5200.

—oOo—

EXHIBIT "O"

No. 76-1304 & 76-3132
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NLRB v. Rabco Metal Products, Inc.,
FILED FEB. 8, 1978, Emil E. Melfi, Jr.,
Clerk, U.S. Court of Appeals.

[ORDER]

No. 76-1304 & 76-3132
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD, Petitioner,
v.
RABCO METAL PRODUCTS, INC., Respondent.

FILED
Feb. 8, 1978
Emil E. Melfi, Jr., Clk. U.S. Ct. Appeals.

ORDER

Before: HUFSTEDLER and SNEED, Circuit Judges, and PALMIERI,* District Judge.

The memorandum heretofore filed is modified by striking the two sentences at page 2, lines 1 through 6, following the citation to Warehousemen's Union, and by substituting the following: "Raab's categorical denial of all but one of the conversations testified to by his employees, coupled with other inconsistencies in his testimony, supplied sufficient evidence in the record to sustain the Board's credibility determination."

Respondent has correctly called to our attention disharmony in our opinion concerning the degree to which an employer must be motivated be anti-union animus, in a mixed motive case, before a discharge will be deemed unlawful. Thus, in Western Exterminator Company v. NLRB, ___F.2d___ (No. 76-2293, Dec. 7, 1977), the Court adopted the "moving cause" or "dominant motivation" formulation. Similar language is used in such cases as NLRB v. West Coast Casket Co., 469 F.2d 871 (9th Cir. 1972); NLRB v. Miller Redwood Co., 407 F.2d 1366 (9th Cir. 1969);

* Honorable Edmund L. Palmieri, Senior United States District Judge, Southern District of New York, sitting by designation.

and NLRB v. Ayer Lar Sanitarium, 436 F.2d 45 (9th Cir. 1970) (also uses "partially motivate"). On the other hand, such cases as NLRB v. Central Press of California, 527 F.2d 1156 (9th Cir. 1975) state simply that anti-union sentiment must at least "partially motivate the discharge".

It is unnecessary for us to decide whether differing formulations represent a substantive conflict, or whether they are simply linguistic differences because in the case before us there was ample justification in the record to sustain the Board's determination that anti-union animus was the moving force for the discharge. No delicate balancing of motivation was required under the facts of this case. We, therefore, leave to another case the question whether intracircuit conflict exists which would justify en banc rehearing.

The panel as constituted in the above case has voted to deny the petition for rehearing. Judges Hufstedler and Sneed have voted to reject the suggestion for a rehearing en banc.

The full Court has been advised of the suggestion for an en banc hearing, and no judge of the Court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b)

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

—oOo—